ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1170 (Consolidated with Nos. 18-1178, 18-1197, 18-1199)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAMROCK FOODS COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petitions for Review of the Orders of the National Labor Relations Board,
366 NLRB No. 107 (June 22, 2018), 366 NLRB No. 117 (June 22, 2018)

PETITIONER'S OPENING BRIEF

Mark W. DeLaquil
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036
Tel: (202) 861-1527
Fax: (202) 861-1783
Email: mdelaquil@bakerlaw.com
Counsel for Shamrock Foods Company

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Petitioner states as follows:

I. PARTIES

A. Appearing Before the National Labor Relations Board

1. Charging Party: Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC

2. Respondent: Shamrock Foods Company

3. Government: Counsel for the General Counsel, National Labor Relations Board, Region 28

B. Appearing Before this Court

1. Petitioner: Shamrock Foods Company

2. Respondent: National Labor Relations Board

3. Respondent-Intervenor: Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC

II. RULINGS UNDER REVIEW

1. *Shamrock Foods Company and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC*, 366 NLRB No. 107 (June 22, 2018)

2. *Shamrock Foods Company and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC*, 366 NLRB No. 117 (June 22, 2018)

III. RELATED CASES

There are no known related cases pending in any other United States Court of Appeals or any other court in the District of Columbia. There was a related case that is no longer pending brought under Section 10(j) of the National Labor Relations Act, *Overstreet v. Shamrock Foods Co.*, 679 Fed. Appx. 561 (9th Cir. 2017).

RULE 26.1 DISCLOSURE STATEMENT OF SHAMROCK FOODS COMPANY

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner, Shamrock Foods Company ("Shamrock") hereby states that it is a privately held corporation engaged in the business of food distribution. Shamrock has no parent company, and no publicly traded entity owns 10% or more of shamrock's stock. Shamrock is incorporated in the state of Arizona and is licensed to do business in a number of states.

Respectfully submitted,

BAKER & HOSTETLER LLP
Counsel for Shamrock Foods Company

/s/ Mark W. DeLaquil
Mark W. DeLaquil
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036
Tel: (202) 861-1527
Fax: (202) 861-1783
Email: mdelaquil@bakerlaw.com
Counsel for Shamrock Foods Company

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GLOSSARY OF ABBREVIATIONS

ALJ ..... Administrative Law Judge

CPDR..... Constructive Performance Discussion Record

LPN..... License Plate Number

NLRB..... National Labor Relations Board

INTRODUCTION

In 2014 and 2015, Petitioner Shamrock Foods Company was faced with a purported organizing campaign at its Phoenix, Arizona distribution center in which the union never filed an election petition or even identified which bargaining units of employees it wished to represent. As the union's efforts faltered, it filed complaints alleging a bevy of unfair labor practice violations. Between charges on which Shamrock prevailed before the ALJ or the NLRB, Shamrock has been vindicated against most of the charges. Shamrock was able to do so despite procedural irregularities, such as contrary findings based on Shamrock's inability to satisfy 66 broad document requests that were propounded less than ten business days before trial and the Union's refusal to make available surreptitious recordings that could exculpate Shamrock. In this action, the Court should review the remaining charges and set them aside as arbitrary or unsupported by substantial evidence.

JURISDICTIONAL STATEMENT

The National Labor Relations Board (the "Board" or "NLRB") had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). On June 22, 2018, the Board issued its decisions in Case Nos. 28-CA-150157 and 169970, which granted relief in part on the Board's General Counsel's claims. Shamrock, the "aggrieved party" in both cases, timely petitioned for review in 28-CA-150157 on June 25 and review of 28-CA-169970 on June 28.

STATEMENT OF ISSUES

Whether the Board's decisions that Shamrock committed unfair labor practices at the Arizona Foods facility are arbitrary or unsupported by substantial evidence.

STATEMENT OF THE CASE

A. Shamrock's Phoenix Facility

Shamrock, a family-owned wholesale foods distributer, operates Arizona Foods, which is a distribution center in Phoenix, Arizona. J.A xx (Hearing Transcript ("TR.") 138-140).[1] Arizona Foods includes a warehouse, a meat processing plant, cold storage facilities, and administrative offices. J.A xx (*Id.* at 138-39). The corporate offices are approximately thirty minutes from the distribution center. J.A xx (TR1 428).

B. Union Organizing Campaign

In late 2014 or early 2015, the Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union (the "Union") claims to have commenced an organizing campaign at Arizona Foods. The Union has never filed an election petition or otherwise identified the unit of employees it seeks to represent.

As the campaign was failing, the Union filed its original unfair labor practice charge against Shamrock on April 15, 2015. J.A xx (GCX 1(a)). The Union alleged only that Shamrock discharged an unnamed employee for his Union activities and that it maintained unlawful rules in its employee handbook. J.A xx (*Id.*). Subsequently, the Union's allegations increased dramatically in scope, and ultimately included claims of

[1] The hearing transcript in 28-CA-150157 will be referred to herein as "TR1."

interrogation, confiscation of union literature, and a series of purported speech violations. J.A xx (GCX 1(e)).

C. Arizona Foods Operating Procedures

The warehouse employees are divided into an inbound crew ("receiving") and an outbound crew ("shipping"). The inbound crew, comprised of receivers and forklifters, is responsible for receiving truck deliveries of product, where it is unloaded by a third-party crew. J.A xx (TR2 138, 450-51).[2] The receivers verify the shipment is correct, and the forklifters transport the products to the upper levels of the warehouse racks. J.A xx (TR2 99, 134, 205, 405, 451, 557, R. Ex. 5). Meanwhile, the outbound crew includes forklifters, order selectors, loaders, and dispatchers—they are responsible for collecting and shipping customer orders. J.A xx (TR2 42, 98). The forklifters place product on the lower-level "pick slots" on the racks, the order selectors compile customer orders and place them on conveyor belts where loaders place the orders on trucks, and then dispatchers send loaded trucks out to deliver products to customers. J.A xx (TR2 42, 194-200; R. Ex. 1; R. Ex. 2; R. Ex. 3; R. Ex. 4). Although the inbound and outbound crews operate independently, the forklifters perform tasks related to both inbound and outbound work. J.A xx (TR2 490-92, 352-353). And, at certain times, the forklifters were placed into their own crew with staggered break times.

[2] The hearing transcript in 28-CA-169970 will be referred to herein as "TR2."

The break policy established by management requires employees to take breaks with their crew because the work, which is heavily interrelated, would grind to a halt without the entire crew working together. J.A xx (TR2 102-103, 448-49, 269, 303, 808-09, 357, 785, 622-23). For example, if all members of the inbound crew were not operating in sync, the inbound docks would become cluttered and products would not be stored timely. J.A xx (TR1 785, 809). Similarly, if the outbound crew was not operating in sync, the loaders may not have product to load and the dispatchers then would not have trucks to send out. J.A xx (TR2 273, 809).

In January 2015, the inbound crew started operating 24 hours a day, and Shamrock changed the crew structure by placing all of the forklifters into a third, separate crew. J.A xx (TR2 222-24, 300). It was only during 2015, when the forklifters were combined into a separate crew, that supervisors directed the forklifters to stagger their break so that a forklifter was always available. J.A xx (TR2 275, 789, 827-30). The three-crew system proved unsuccessful. On January 24, 2016, Shamrock returned to the previous system with an inbound and an outbound crew. Using a bid process, Shamrock allowed forklifters to choose their crew and shifts. J.A xx (TR2 231, 298, 391, 662, 712, 715, 747-48).

D. Claim About Steve Phipps

Several of the claims in this appeal relate to Steve Phipps, a forklifter. As of January 24, Phipps was assigned to the inbound crew and required to take his breaks with them. J.A xx (TR2 661, 676, 715, 778-79). On January 26, Phipps took a late lunch

break because the outbound crew asked him to help move products from the non-conveyable area of the warehouse.[3] J.A xx (TR2 678). Roy Aja, an inbound crew receiver, also took a late lunch after checking-in a special produce delivery. J.A xx (TR2 397-98; GCX 16). Their supervisor, Richard Gomez, entered the break room and asked both employees why they were taking their breaks at an unassigned time. After both explained their reasons, which did not include a claim of authorization from either, Gomez instructed them to take their breaks as scheduled. J.A xx (TR2 390-98, 678; CGX 16). Gomez also relayed this incident via email to other members of management including warehouse manager Ivan Vaivao; outbound shipping manager Armando Gutierrez; inbound manager Brian Nicklin; and inbound supervisors Johnny Banda, Dave Garcia, and Roy Shreeve.[4] J.A xx (TR2 390, 397; GCX 16). Gomez wanted to remind these members of management to use employees from their own crews unless they had communicated the need for an alternative arrangement. He also wanted the

[3] The non-conveyable area is for items that are too heavy or too large to transport by conveyor belt. J.A xx (TR2 404-05).

[4] Gomez, Banda, Garcia and Shreeve are all inbound supervisors who report to inbound manager Brian Nicklin. Nicklin and Gutierrez, the shipping manager, report to Vaivao, the warehouse manager. J.A xx (TR2 95, 394-97).

inbound supervisors to be aware of the issue with the produce truck that Aja had been unloading. J.A xx (TR2 397-98).[5]

Despite his supervisors' instructions, Phipps ignored his designated break time again on February 11. His manager, Nicklin, and supervisor, Gomez, both observed Phipps working at 1:16 pm, immediately following the scheduled break time of 1:00 pm – 1:15 pm. J.A xx (TR2 675). In response to a question about why he was working, Phipps informed them that he was taking his breaks at different times so he could talk to employees on later shifts about the Union. J.A xx (TR2 461, 722). When Nicklin instructed him to take his break as scheduled, Phipps responded that Shamrock was not permitted to enforce its break policy due to the Union's allegedly ongoing interest in organizing the warehouse. J.A xx (TR2 461, 675).

Phipp's statement about the break policy was relayed to Vaivao and ultimately reached Tim O'Meara, the Phoenix Operations Manager. At O'Meara's request, Phipps met with O'Meara, who specifically reassured Phipps that the meeting was not disciplinary. J.A xx (TR2 168, 682). Rather, O'Meara and Vaivao explained the break policy and reiterated to Phipps that he take his breaks as scheduled with his crew. J.A

[5] Aja was unloading a truck from Specialty Produce, a company that delivers small batches of unusual produce items to Shamrock. J.A. xx (TR2 397). Aja reported to Gomez that the purchasing department was pressuring him to close out the truck so that it would be able to leave the dock. J.A. xx (TR2 398). Gomez advised Aja that he did not report to purchasing, and that he should take his breaks as directed. J.A. xx (*Id.*). He then copied Vaivao and Nicklin on the email so that they would be aware of the issue with Purchasing. J.A. xx (*Id.*).

xx (TR2 160; GCX 8). They also explained that he was not being singled out, and that all employees were required to follow the break policy. J.A xx (TR2 160). Though he argued that the company was "changing the enforcement" of the break policy, Phipps admitted that it was being enforced uniformly to all employees. J.A xx (TR2. 723-24).

In the meeting, Phipps did not receive a Constructive Performance Discussion Record ("CPDR").[6] He did not sign anything in the meeting, nor did he see any documentation of the conversation. J.A xx (TR2 724). At trial, Phipps admitted that he was told the February 11 meeting was not disciplinary. J.A xx (TR2 750-51). O'Meara did not take Phipps' union activity into account in any way, rather he simply wanted to make sure that Phipps understood the need to adhere to the break schedule as posted. J.A xx (TR2 424).

E. Claim About Michael Meraz

This appeals also concerns Michael Meraz, a forklifter, who the NLRB found was unlawfully issued a verbal warning based on its decision that Shamrock's disciplinary action against Meraz for misplacing a pallet was pretextual. J.A xx (TR2 337-38; GCX. 5).

Shamrock requires warehouse associates to follow certain inventory procedures for moving and storing pallets. With as many as 50,000 pallets of inventory at any given time, the inventory procedures are necessary for maintaining an accurate record of each

[6] All written discipline at Shamrock is issued on a form known as a Constructive Performance Discussion Record, or "CPDR." J.A xx (TR2 337).

pallet's location. The process begins with the inbound receiver, who creates a "license plate number," or "LPN," for each pallet after inspection on the inbound dock. J.A xx (TR2 138-39). Anytime a pallet is moved, including inbound and outbound movement, the forklifter is required to scan both the pallet's LPN and the new physical location with a handheld, wireless scanner. J.A xx (TR2 206, 456, 607-08, R. Ex. 5). The scanned information is wirelessly transmitted via the scanner to Shamrock's electronic inventory system, creating an LPN history that tracks the movement of all inventory in the warehouse. J.A xx (TR2 138, 385, 458, 481).

Failing to follow the put-away protocol has other consequences such as product damage, missing products, product expiration, and more. J.A. xx (TR2 381); J.A. xx (R. Ex. 18-19, 21-24, 27-28). Accordingly, if a pallet is not in the correct location as reflected in the electronic inventory, the warehouse inventory control team is notified. J.A xx (TR2 355-56). Along with tracking inventory, the scanning records are used to calculate compensation for forklifters, who are compensated in part based on the number of pallets they scan and move during a shift. J.A xx (TR2 489-90). The forklifter can review the scan records to confirm whether a move occurred if the scanner loses connectivity while the forklifter is scanning the pallet. J.A xx (TR2 587-88). If the move was not recorded, the pallet is re-scanned. J.A xx (*Id.*).

Meraz admitted that failing to scan the correct pallet location constituted a failure to follow put-away procedures—and it is uncontroverted that failing to follow the put-away protocol is cause for discipline. J.A xx (TR2 608, 381-84). It is likewise

uncontroverted that Shamrock entered evidence regarding numerous incidents where employees were disciplined for failing to follow standard put-away procedures (e.g., improperly stacking pallets, storing a pallet in the wrong temperature zone, mislabeling a product, etc.). J.A xx (TR2 282, 341, 381-82; R. Ex. 18-19, 21-24, 27-28).

Before arriving at work on January 16, Gomez, Meraz's supervisor, learned from the previous night's shipping report that a customer had been shorted 30 cases of ranch salad dressing. J.A xx (TR2 365-66). The report indicated that the error was because of a missing pallet that the inventory control clerk was unable to locate. J.A xx (*Id.*). This particular pallet had been special ordered by a catering company for delivery on January 16, and the high number of shorts for a single customer caught Gomez's attention. J.A xx (TR2 146, 364-65). Upon tracing the electronic footprint with the LPN history, Gomez learned that Meraz was the last employee to move the pallet. J.A xx (*Id.*). He went to the last physical location in the LPN history and confirmed that pallet was not there. J.A xx (*Id.*). After searching the aisles in that vicinity for an hour, Gomez located the pallet in the bay next to the location that Meraz scanned. J.A xx (TR2 366-67, 859). Gomez described his effort as searching for a "needle in a haystack." J.A xx (TR2 373).

Gomez reported to Vaivao that Meraz physically placed the pallet in one location while electronically scanning it into a different location. J.A xx (TR2 120-22, 268, 374). Although Vaivao recommended that Meraz receive a verbal warning, Gomez requested a CPDR for failure to follow standard put-away procedures. J.A xx (*Id.*; GCX 5). When he was given a CPDR, Meraz refused to sign it and demanded to speak with Daniel

Santamaria, a Human Resources Business Partner. J.A xx (TR2 71). Meraz thereafter went to Santamaria's office and asked Santamaria to come to the warehouse floor where the pallet was found. J.A xx (TR2 53, 59, 71). Once there, Meraz suggested to Santamaria that the error could have occurred because of a loss of scanner connectivity, which was a semi-recurring problem in the warehouse. J.A xx (TR2 69). Santamaria informed Meraz that he would investigate further to determine if a verbal warning was justified.

In the next several days, Santamaria gathered relevant information. J.A xx (TR2 71). He found various records, including an email from an inventory control clerk, Meraz's task report, and video footage—all records confirmed Meraz was the associate who scanned the pallet into the improper location and no one touched it since then. J.A xx (TR2 77, 125, 283; GCX 6 & 7). Based on this information, Vaivao and Santamaria concluded that the verbal warning—the lowest level of recorded discipline—was proper. J.A xx (TR2 77-78). The video footage, LPN history, and inventory clerk email all confirmed that Meraz was the last person to touch the pallet before it was lost. Moreover, Meraz's task report reflected that his scanner was working correctly at the time. J.A xx (*Id.*; GCX 6). And even if Meraz's scanner had lost connectivity, it would not have created a false record—it would have created **no record** at all. J.A xx (TR2 123-25).

On February 1, Santamaria and Vaivao met with Meraz to explain their findings and that the verbal warning was warranted because Meraz had not properly followed

put-away procedures. J.A xx (TR2 78, 84, 128). They explained that the warning would stay on his record for seven weeks, including the previous two week investigation. J.A xx (TR2 149, 599-600). Meraz acknowledged that he understood and signed the verbal warning. J.A xx (TR2 GCX 21). The warning become void five weeks later as Meraz committed no further errors. J.A xx (TR2 602, 606). Vaivao and Gomez both testified unequivocally that Meraz's purported union activity did not play any role in the warning. J.A xx (TR2 804; 858-859). Rather, the warning was simply because of his error in following put-away procedures.

PROCEDURAL HISTORY

A. Case No. 28-CA-150157

On July 27, Shamrock was served by the General Counsel with a complaint alleging 46 violations of the Act between January 25 and July 8. J.A xx (GCX 1(g)). The trial before the ALJ was scheduled to begin on September 8, 2015.

Nine business days before trial,[7] the General Counsel served Shamrock with a subpoena requesting 66 categories of documents. J.A xx (GCX 2(a)). A number of the subpoenaed items were discovery requests geared toward matters not alleged as violations. For example, the subpoena demanded production of all "documents showing or describing activities related to the Union ***or to unions generally***." *See* J.A

[7] General Counsel served the subpoena 14 calendar days before trial. That 14-day period included two weekends and one federal holiday, leaving only nine business days (including the date of service) for Shamrock to respond.

xx (SDT at ¶14). The reference to "unions generally" disavowed any pretense that the subpoena was limited to the matters in the Complaint.

Other requests were entirely divorced from the alleged unfair labor practice and were more akin to information unions request after they have shown sufficient support to merit an election.

- Every Shamrock full-time and regular part-time employee working at the Arizona distribution center, regardless of whether they were part of the relevant bargaining unit;
- Their dates of hire;
- The job classifications they occupied;
- Their rates of pay;
- The nature and effective dates of all pay changes for each individual;
- All changes in the employment status for each individual; and
- The dates of any such changes.

See id. at J.A xx (¶ 53); *see also* J.A xx (¶ 52). But in this case, the Union never filed an election petition. *See, e.g.*, J.A xx (ALJ-JDW 35).[8]

Shamrock filed a petition to revoke the General Counsel's subpoena on a number of grounds, including (but not limited to) those explained above. J.A xx (GCX 2). Shamrock additionally moved for a continuance, explaining that it would not have

[8] The decisions of Administrative Law Judge Jeffrey D. Wedekind in 28-CA-150157 will be referred to as "ALJ-JDW."

sufficient time to collect the subpoenaed information. J.A xx (GCX 1). Both requests were summarily denied. J.A xx (TR1 16-17; GCX 1).

Shamrock produced more than 3,000 pages of responsive documents on the trial's first day. Unfortunately, however, the truncated timeframe precluded the Company from reviewing the full universe of potentially responsive documents. The ALJ therefore awarded sanctions (1) prohibiting Shamrock from presenting witnesses concerning the duties performed by Art Manning, an alleged Section 2(11)[9] supervisor, and (2) limiting the company's cross examination of General Counsel witnesses concerning Manning's responsibilities to the basis for their asserted personal knowledge. J.A xx (TR1 69, 109:1-23, 123:10-11).

Subsequently, the ALJ prohibited questioning even on personal knowledge. J.A xx (Tr. 825:18-826:8). The ALJ later expanded the sanctions ***again*** to prohibit Shamrock from examining witnesses concerning a purportedly unlawful wage increase, after the General Counsel claimed that it had mistakenly excluded this issue from its original sanctions request. J.A xx (TR1 911:20-925:25).

As the trial progressed, General Counsel submitted a number of recordings that Phipps surreptitiously made in meetings with Shamrock representatives. Phipps testified that he recorded "every meeting that [he] attended with management," including recordings other than those General Counsel submitted as exhibits, and that

[9] 29 U.S.C. § 152(11).

he turned all of his recordings over to the Union. J.A xx (TR1 568:18-23; 590:11-591:25, 593:4-11). Shamrock served the Union with a subpoena requesting production of all recordings made on Shamrock property other than those the General Counsel introduced.

The Union never petitioned to revoke the subpoena, and never denied that Phipps had provided the additional recordings. Nonetheless, the Union failed to produce a single recording in response, offering no explanation for why the recordings were no longer in its possession. Shamrock therefore requested an adverse inference that the unproduced recordings would corroborate the non-coercive context of Shamrock's discussions with employees concerning the possible results of unionization. Despite readily granting sanctions in General Counsel's favor, the ALJ declined Shamrock's request. Without explanation, the ALJ declared that the Union's failure to produce the subpoenaed evidence was not "contumacious." J.A xx (ALJ-JDW at 6 n. 8).

The trial went from September 8-16 during business days and on November 25 in Phoenix, Arizona. J.A. xx (ALJ-JDW 7). The ALJ issued his recommended decision on February 11, 2016 (the "ALJ-JDW") finding violations in regard to slightly more than half of the General Counsel's allegations. In so doing, the ALJ rejected Shamrock's argument that the Union's records of meeting that it failed to product in response to Shamrock's subpoena would corroborate the lack of a coercive atmosphere on the basis

that there was no evidence pertaining to the discussions at the other meetings. J.A xx (*Id.*).

During pendency of the administrative proceeding, General Counsel sought and obtained injunctive relief against Shamrock under Section 10(j) of the Act. *See Overstreet v. Shamrock Foods Co.*, 679 Fed. Appx. 561 (9th Cir. 2017).

B. Case No. 28-CA-169970

The General Counsel filed a complaint on March 30, 2016, and a consolidated complaint on April 25, 2016 against Shamrock alleging various violations of the Act. J.A xx (BDT at 1). Specifically, the complaint alleges four violations of the Act: (1) on January 24, Shamrock allegedly subjected employees including Steve Phipps to stricter enforcement of its previously unenforced break schedule; (2) on January 26 and February 11, Shamrock allegedly subjected Phipps to closer supervision; (3) on February 1, Shamrock issued a verbal warning to Michael Meraz; and (4) on February 11, Shamrock verbally disciplined Phipps. The General Counsel further alleged that Shamrock violated 8(a)(4) and (1) of the Act for the same actions because Phipps and Meraz gave testimony to the Board. J.A xx (*Id.*). The case was tried in Phoenix, Arizona from May 24-27 and on June 9 before Administrative Law Judge ("ALJ") Amita Baman Tracy. J.A xx (*Id.*). On September 28, ALJ Tracy issued her recommended decision finding violations on all claims. J.A xx (*Id.*).

During pendency of the administrative proceeding, General Counsel sought and obtained injunctive relief against Shamrock under Section 10(j) of the Act. *See Overstreet*, 679 Fed. Appx. at 561.

SUMMARY OF ARGUMENT

The Board decisions in this consolidated case are a mixture of mischaracterization, hyperbole and second-guessing. The General Counsel and the Union claim that Shamrock conducted a massive campaign of purported discipline, threats, interrogation, and surveillance to discourage its employees from unionizing. Moreover, they claim that Shamrock inexplicably continued its purported campaign long after the Union had all but abandoned its effort to organize Shamrock's Phoenix facility. But, despite this purportedly widespread and longstanding campaign, the General Counsel was able to produce a mere four non-supervisory witnesses from hundreds of Shamrock employees.

In truth, the General Counsel's evidence in Case No. 28-CA-150157 consists of more "spin" than fact. The General Counsel's claims of "surveillance" and "interrogation," for example, include a brief conversation in which a supervisor asked two employees who were conversing on the warehouse floor if they were on break. The General Counsel's claim that Shamrock unlawfully solicited employee grievances ignores Shamrock's extensive and undisputed history of soliciting employee feedback. The ALJ overlooked these flaws in the General Counsel's case, and the Board erred in adopting his opinion.

The General Counsel's evidence in Case No. 28-CA-169970 is equally deficient, consisting of little more than second-guessing of Shamrock's operational policies and procedures. The Board adopted the ALJ's holding in that case that Shamrock unlawfully directed employee Steve Phipps to take his breaks with the rest of his crew in accordance with the Company's long-standing break policy. While the ALJ found that the break policy was not previously enforced, the General Counsel's own witnesses testified otherwise.

The Board erroneously adopted a number of the ALJ's other findings as well. For example, the ALJ incorrectly found that Shamrock subjected Phipps to "closer supervision," despite the General Counsel's failure to introduce any evidence demonstrating the typical level of supervision in the facility. The ALJ found a violation based upon a long-expired verbal warning issued to employee Michael Meraz based on multiple theories for how Meraz might not have committed the error for which he received the warning. But Meraz himself testified that there was no evidence to support these theories. The ALJ's findings were therefore unsupported and unsupportable, and the Board erred in adopting them. For these reasons and those explained below, the Court should vacate both orders under review.

STANDING

Shamrock has Article III standing because it is the respondent to the orders under review and those orders injure Shamrock by, among other things, requiring it to post notices. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (holding that

there is little question of standing where the complainant seeks review of an agency adjudication to which she was a party).

STANDARD OF REVIEW

The Board's findings[10] in this matter involve purported violations of Sections 8(a)(1) and (3) of the Act for allegedly improperly disciplining employees because of their Union activities and participation in the Board's processes. For allegations arising under 8(a)(1), the appropriate legal standard for the claim is set forth in the respective section. Allegations arising under 8(a)(3) are subject to the burden-shifting approach established in *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under the *Wright Line* test, the NLRB must make an "initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." *Am. Gardens Mgt. Co.*, 338 NLRB 644, 645 (2002); *see also General Die Casters, Inc.*, 358 NLRB 742, 744 (2012) (applying *Wright Line* in case alleging an 8(a)(4) violation). Specifically, the General Counsel is required to prove that the employee's protected conduct was the motivating factor in the adverse action by showing the employee engaged in protected activity, the employer had

[10] In case 28-CA-169970, the General Counsel originally alleged a series of 8(a)(1) violations in addition to the 8(a)(3) and 8(a)(4) allegations. As the trial proceeded, the General Counsel withdrew those unsupported allegations. Moreover, because claims under Section 8(a)(3) and 8(a)(4) are both subject to the *Wright Line* burden shifting analysis, claims concerning participation in the Union campaign and prior Board proceedings will be collectively referred to herein as their "protected activity" except where otherwise noted.

knowledge of the protected activity, and bore animus against the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

If the General Counsel satisfies its *prima facie Wright Line* burden, the employer still may avoid liability by establishing an affirmative defense, *i.e.*, that the same action would have been taken in the absence of the protected conduct. *Security U.S.A.*, 328 NLRB 374 (1999); *DSI Enterprises, Inc.*, 311 NLRB 444 (1993). Notably, this defense does not require the employer to establish that an employee ***actually*** engaged in misconduct. Rather, the employer need only establish an honest belief that misconduct occurred. *See Yuker Constr. Co.*, 335 NLRB 1072, 1073 (2001)("[The employer] 'shot from the hip' and acted hastily on a mistaken belief [that employees engaged in wrongdoing], but…such conduct does not constitute an unfair labor practice.")

General Counsel also alleges claims of "closer supervision." Such claims require more than generalized statements of increased monitoring. *See*, *e.g.*, *American Furniture Co.*, 239 NLRB 408, 413 (1989). Rather, the General Counsel must establish the specific manner in which the level of supervision changed, and the fact that the change was in retaliation for protected activity. *See General Die Casters, Inc.*, 358 NLRB at 746; *Liberty House Nursing,* 245 NLRB 1194, 1201 (1979).

The Court "may set aside a decision of the Board when it departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence." *King Soopers, Inc. v. N.L.R.B.*, 859 F.3d 23, 29–30 (D.C. Cir. 2017) (citations and quotations omitted). "Substantial

evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and quotations omitted). Likewise, the Court may set aside a decision where "'the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.'" *Wayneview Care Ctr. v. N.L.R.B.*, 664 F.3d 341, 348 (D.C. Cir. 2011) (quoting *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000)). A decision of the Board that "departs from established precedent without a reasoned explanation" is arbitrary. *N.L.R.B. v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016) (citing *Comau, Inc. v. N.L.R.B.*, 671 F.3d 1232, 1236 (D.C. Cir. 2012)). The Board need not address "every conceivably relevant line of precedent in [its] archives," but it must discuss "precedent directly on point.'" *Id.* (quoting *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013)).

ARGUMENT

I. THE BOARD ERRED IN EVEN PARTIALLY ADOPTING THE ALJ'S RECOMMENDED DECISION IN CASE NO. 28-CA-150157

A. The Board Erroneously Adopted the ALJ's Rulings on the Subpoenaed Materials

1. The Adverse Inferences in the Board's Decision Are Erroneous

The Board's decision to penalize Shamrock through adverse inferences because of its inability to comply with 66 overly broad document requests—filed months after the Complaint but less than 10 business days before trial—is an abuse of discretion.

Under NLRB regulations, a subpoena must be revoked if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings." 29 C.F.R. §102.31(b) (2005). Moreover, "[a] subpoena [] should seek relevant evidence and should be drafted as narrowly and specifically as is practicable." NLRB Casehandling Manual (Unfair Labor Practice Cases) at ¶ 11776.

Rather than being targeted for the actual alleged unfair labor practices in this case—allegedly improper comments and purportedly unlawful discipline issued on specific dates to specific employees—the subpoena required production of any Shamrock document "showing or describing activities related…***to unions generally***." *See* J.A xx (SDT at ¶ 14). The subpoena furthermore required Shamrock to disclose the names, hire dates, job classifications and pay histories for every full-time and regular part-time employee working at Shamrock's Arizona distribution center, a request that encompassed 280 management and hourly employees. *See* J.A xx (SDT at ¶ 53). The NLRB instead declared that such information was "reasonably relevant to the matters at issue," without identifying a ***single*** Complaint allegation to which the disputed requests related. J.A xx (Order Denying PTR at 4).

In truth, the NLRB effectively applied the broad, discovery-type relevance standard applicable under Federal Rule of Civil Procedure 26—a standard that does not apply to Board litigation because pre-trial discovery is not permitted. *N.L.R.B. v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978 (2nd Cir. 1975). Under these circumstances, the Board's decision to affirm the ALJ's adverse inference was arbitrary and violates fundamental

notions of fairness and due process. *Housing Authority of County of King v. Pierce*, 711 F. Supp. 19 (D.C. Cir. 1989). Moreover, because the ALJ's denial of Shamrock's petition to revoke ultimately resulted in sanctions,[11] the ALJ's application of the erroneous relevance standard was unfairly prejudicial toward Shamrock and tainted the Board's decision.

2. The Board's Failure To Sanction the Union's Withholding of Exculpatory Records Is Erroneous

The Board further erred in adopting the ALJ's refusal to sanction the Union for withholding exculpatory recordings Phipps made of meetings with Shamrock management. Without explanation, the ALJ found that the Union's failure to produce the recordings was not "contumacious." J.A xx (ALJ-JDW 6 n.8). But the Union never petitioned for revocation of Shamrock's subpoena, never appeared to contest subpoena, and never explained its decision to withhold the recordings. Under these circumstances, the Board's adopting the ALJ's finding that the Union's decision to ignore Shamrock's need for the recordings was not "contumacious" is arbitrary.

The Board further compounded the ALJ's error. It found, without explanation, that the subpoenaed recordings "were not in [the Union's] possession or control." J.A xx (BD1 at n.1). But, the Union never rebutted Phipps' unequivocal testimony that the

[11] At a minimum, the sanctions awarded to the General Counsel were overbroad in light of the breadth of the subpoena, the service of the subpoena 9 business days before trial, Shamrock's production of more than 3,000 pages of documents, and other issues that Shamrock raised during and before trial. *See, e.g.*, J.A. xx (TR1 113:12-25-115:16, 116:18-117:22.)

Union held a complete set of the recordings he made. J.A xx (TR1 590:11-591:25, 593:4-11). In short, the Board's finding that such recordings were not in the Union's possession is not only unsupported, it is patently ***incorrect***.

Without access to the Union's surreptitious recordings of meetings with Shamrock management, which would put the contested incidence in this case in context and show that the company was not acting coercively, the Board's decision on those claims is arbitrary and should be vacated.

B. The Board's Finding of a Violation in Regard to Thomas Wallace's Severance Agreement Is Based on a Theory that General Counsel Explicitly Declined To Pursue.

The Board also erred in finding that a severance agreement Shamrock offered to former employee Thomas Wallace at the time of his separation violated Section 8(a)(1). J.A xx (BD1 at n.12). General Counsel alleged in its Complaint that the agreement constituted an unlawful work rule, but did not claim that the agreement was unlawful in any other respect. J.A xx (Compl. ¶ 5(r)). The General Counsel explicitly affirmed during trial that it was pursuing this claim ***solely*** as an unlawful work rule. J.A xx (TR1 688-89). The ALJ subsequently held that paragraphs 10, 12 and 13 of the severance agreement were unlawful, apparently based on the work rule theory that General Counsel alleged. J.A xx (ALJ-JDW 43-44).

The Board correctly rejected the notion that Wallace's severance agreement was a "work rule" within the meaning of NLRB precedent, yet proceeded to find violations under Section 8(a)(1) based on theories that were neither alleged nor litigated. "The

applicable law is clearcut…[t]he Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *N.L.R.B. v. Blake Const. Co., Inc.*, 663 F.2d 272, 279 (D.C. Cir. 1981); *see also*, *e.g.*, *N.L.R.B. v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir 1987) ("[S]imple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without trangressing [a respondent's] due process rights.").

In addition, Paragraphs 10 and 12 of Wallace's severance agreement are lawful under the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), issued after the ALJ's decision in Case No. 28-CA-150157. The new *Boeing* standard applies retroactively to all pending cases, including this matter. The Board's decision on this point should therefore be vacated.

C. Kent McClelland's May 8 Letter Was A Lawful Prohibition Against Threatening Conduct.

The Board erred in finding a violation of Section 8(a)(1) based on a letter to employees from Kent McClelland, Shamrock's President and Chief Executive Officer, dated May 8, 2015. J.A xx (BD1 at 2 fn. 8). McClelland sent the May 8 letter after learning that a number of employees reported being threatened at work. J.A xx (TR1 354:7-12). McClelland felt that it was imperative to remind employees that "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior" would not be

tolerated. J.A xx (GCX 14). McClelland suggested in the letter that any employee who felt threatened should report the situation. J.A xx (*Id.*)

As recognized in *Adtranz ABB Daimler-Benz Transp. v. NLRB*, any consideration of an anti-harassment rule under Section 8(a)(1) must reflect an appreciation for the fact that "employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment." 253 F.3d 19, 27-28 (D.C. Cir. 2001). Like the rule at issue in *Adtranz*, the McClelland letter in this case prohibited unlawful workplace harassment. In fact, the letter was specifically limited to "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior."

Such conduct is not protected under the Act.[12] Nor would the May 5 letter's prohibition against "unlawful bullying" and "threatening, violent, or unlawfully coercive behavior" reasonably be understood to prohibit legally protected union solicitation. *See Liberty House Nursing Homes, Inc.*, 245 NLRB at 1197. As this Court observed in *Adtranz*, "America's working men and women are…capable of discussing labor matters in intelligent and generally acceptable language." 253 F.3d at 26.

The Board also erred in finding that McClelland's May 8 letter unlawfully threatened employees and directed them to report on the concerted activities of their coworkers. J.A xx (ALJ-JDW 31:14-20). As the Board previously recognized, "some instances of harassment are not protected by the Act, therefore, a request that

[12] *See*, *e.g.*, *Starbucks Coffee Co.,* 354 NLRB 876 (2009); *Carither's Stores, Inc.*, 262 NLRB 1381, 1383 (1982).

employees report instances of harassment to management is not tantamount to a request that employees report protected activity." *Stanadyne Automotive Corp.*, 345 NLRB 85, 86-87 (2005).

D. The Allegations Concerning Floor Captain Art Manning Fail On Multiple Grounds.

The Board found that Shamrock violated Section 8(a)(1) on the basis that floor Captain Art Manning attended a Union meeting at a local restaurant and purportedly told coworker Steve Phipps to "watch his back" because "they [are] watching both of us." J.A xx (BD1 at 1-2 n.7). In reaching this conclusion, the Board adopted—without comment—the ALJ's finding that Manning was a "supervisor" under Section 2(11) of the Act, 29 U.S.C § 152(11). As explained below, this finding was erroneous on multiple grounds. In any event, Manning's attendance at the Union meeting is insufficient on its own to establish a violation, even if he was a 2(11) supervisor.

1. General Counsel Failed To Establish Manning's 2(11) Supervisory Status

Supervisory status is construed narrowly because "the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Chevron Shipping* Co., 317 NLRB 379, 380-81 (1995). The party asserting supervisory status must establish that:

(i) The employee "actually possesses" one of the twelve (12) powers listed in Section 2(11), ***and***

(ii) The exercise of that authority "requires the use of independent judgment."

N.L.R.B. v. Health Care & Ret. Corp. of America, 511 U.S. 571, 573-74 (1994); *Beverly Enterprises-Minn., Inc.,* 348 NLRB 727, 731 (2006). Independent judgment must be demonstrated through "concrete evidence showing how assignment decisions are made." *Franklin Hosp. Med. Ctr,* 337 NLRB 826, 830 (2002). The absence of such evidence is construed against the party asserting 2(11) status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 535 n.8 (1999); *Phelps Community Medical Center*, 295 N.L.R.B. 486, 490 (1989).

Here, the ALJ found supervisory status as a cumulative, punitive sanction for Shamrock's alleged non-compliance with the GC's subpoena *duces tecum*. J.A xx (ALJ-JDW 17 n.29). Initially, the ALJ only prohibited Shamrock from eliciting substantive testimony concerning Manning's duties and limiting Shamrock to cross-examining General Counsel's witnesses regarding their asserted personal knowledge of his responsibilities. J.A xx (TR1 69, 109:1-23, 123:10-11). Subsequently, the ALJ prohibited questioning even on personal knowledge, with no explanation for his reversal. J.A xx (TR1 825:18-826:8). When General Counsel ***still*** could not establish Manning's supervisory status, the ALJ simply granted an adverse inference that Manning was a supervisor. J.A xx (ALJ-JDW 18 n.29).

The Board erred in adopting this finding for three reasons. First, Board's decision to grant any adverse inferences relation to the subpoena is an abuse of discretion. *See supra* I.A.

Second, the Board's decision is an unexplained departure from its precedent prohibiting the use of an adverse inference to cure a gap in the General Counsel's case. The Board's decision in *Riverdale Nursing Home*, 317 NLRB 881 (1995), is particularly illustrative. The General Counsel in *Riverdale Nursing* alleged that the two respondents were joint employers. Neither entity provided the records that the General Counsel subpoenaed to support its claim. Moreover, neither entity presented evidence to defend against the General Counsel's joint employer allegation. Nonetheless, the Board rejected the ALJ's imposition of an adverse inference on this issue, noting that the inference "constitute[d] virtually the General Counsel's entire case regarding the Respondents' joint employer status." *Id.* at 882.

As was the case in *Riverdale Nursing*, the ALJ's adverse inference "constitute[d] virtually the General Counsel's entire case regarding" supervisory status. The ALJ noted, in fact, that the "conclusory" evidence concerning supervisory status "would normally…fail[] to satisfy the burden of proof." J.A xx (ALJ-JDW 17 n.29). The Board's unexplained departure from precedent precludes enforcement of its order. *See W & M Properties of Conn., Inc. v. N.L.R.B.*, 514 F.3d 1341 (D.C. Cir. 2008).

Third, an adverse inference requires more than noncompliance with a subpoena. The party seeking an adverse inference must establish (1) that responsive documents exist, and (2) that they would have been pertinent to the resolution of the case. *Peoples Transp. Service*, 276 NLRB 169, 223 (1985); *see also Professional Air Traffic Controllers*, 261

NLRB 922 n.2 (1982) (adverse inference not warranted in light of "confusion concerning the nature, and indeed the very existence, of the documents in question.").

Here, no responsive documents concerning supervisory status were identified in witness testimony. General Counsel had ample opportunity to identify such documents during its examination of Manning, but elected to leave the issue unaddressed. The General Counsel should not be saved from the consequences of its inaction through imposition of an adverse inference, and the Board erred in concluding otherwise.

Setting aside the adverse inference, there is no basis to conclude that Manning was a statutory supervisor. Shamrock therefore cannot be liable for Manning's actions. *Clark Mills,* 109 NLRB 666, 670 (1954) ("He is not a supervisor, and his antiunion statements…may not be charged as activities for which the Respondent may be held responsible.").

2. Manning's Attendance At The January 28 Meeting Did Not Constitute Unlawful Surveillance Under Board Precedent.

Even if Manning was a Section 2(11) supervisor, the Board's rulings concerning his conduct still would be erroneous. The Board held that Shamrock conducted unlawful surveillance because Art Manning attended a Union meeting at a local restaurant, but there was no allegation or evidence from General Counsel that Shamrock asked Manning to attend. J.A xx (BD1 at 1, fn. 7). But, a "supervisor has a right to attend union meetings, as long as he is not directed to do so by the employer, and even to join the union, if admitted to membership." *Music Express East, Inc.*, 340

NLRB 1063, 1076 (2003). The Board's unexplained departure from its own precedent in this regard precludes enforcement of its order. *See NLRB*, 514 F.3d at 1341.

E. The Board Erred In Finding Violations Based On Purported Threats And Statements Suggesting Futility of Organizing.

The Board's findings regarding the various speech violations that the General Counsel alleged ignore Shamrock's right under Section 8(c) of the Act to express its opinions concerning unionization and its potential impact on the business. J.A xx (BD1 at 1 n.4). For example, the Board found a violation of Section 8(a)(1) based on Engdahl's statement during a January 28 meeting that "the slate is wiped clean . . . once bargaining begins." J.A xx (*Id.*). "An employer can tell employees that bargaining will begin from 'scratch' or 'zero' but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union." *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832-33 (1994).

Consistent with *Somerset Welding*,[13] Engdahl advised employees at the beginning of the January 28 meeting that they should conduct "[their] own research." J.A xx (GCX 8(a) at 3). He further noted that there was "tons of stuff out there that's pro-union and there's tons of stuff out there that's against unions." J.A xx (*Id.*). Almost immediately

[13] As explained in Section I.A.2, *supra*, the Union's withholding of is surreptitious records of the meetings should have resulted either in the General Counsel being precluded from submitting the recordings that the Union chose to submit or in an adverse inference that the destroyed recordings would have demonstrated the non-coercive environment of the meetings that were conducted.

after his remark about "the slate is wiped clean," Engdahl acknowledged the possibility that employees may gain from collective bargaining by stating that improvements were not necessarily guaranteed. J.A xx (*Id.* at 9). These statements all reflect "the reality of negotiating and bargaining" and cannot be the basis for a Section 8(a)(1) violation. *Somerset Welding*, 314 NLRB at 832-33.

The Board's findings concerning Engdahl's statements at an April 29 meeting were similarly erroneous. Engdahl told employees that the Company would have to "bargain in good faith," but "that the Company does not have to agree to anything through collective bargaining." J.A. xx (ALJ-JDW 12:27-28; GCX 12(a) at 6). Engdahl also opined that the Union would "hurt" Shamrock and its employees in the future. J.A. xx (BD1 at 1 n.4). He noted on multiple occasions during the meeting that these comments were only an expression of his opinion. *E.g.*, J.A. xx (GCX. 12(a) at 3, 4).

Engdahl's statements closely parallel the Act's recognition that the "obligation [to bargain] does not compel either party to agree to a proposal." 29 U.S.C. § 158(d). As expressions of opinion, his comments furthermore fall within Section 8(c)'s protections. *Id.* § 158(c).

The Board nonetheless adopted the ALJ's findings concerning Engdahl's April 29 statements based on its mistaken belief that other unfair labor practices occurred. J.A. xx (BD1 at 1 n.4). Even setting aside General Counsel's failure to prove the other claimed violations, however, such claims are not a basis for finding that an employer forfeited the First Amendment free speech protections underlying Section 8(c). *See*

NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, [but only] so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* (quoting 29 U.S.C. § 158(c)).

F. The Board's Interrogation Findings Are Factually Incorrect and Legally Unsupportable.

The Board's findings concerning purported interrogation again depart from agency precedent without explanation. NLRB jurisprudence requires consideration of multiple factors in determining whether a particular question amounts to coercive interrogation, including: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984); *see also Bourne v. N.L.R.B.*, 332 F.2d 47 (2d Cir. 1964). The Board has recognized that these factors must be viewed in a manner that is mindful of normal workplace communication to avoid "direct[] colli[sion] with the Constitution." *Rossmore House*, 269 NLRB at 1177. Typically, these factors weigh against a finding of a violation in circumstances brief conversations among employees and low-level supervisors. *E.g.*, *Toma Metals, Inc.* 342 NLRB 787, 789 (2004); *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224-25 (2002).

Here, the Board found that first-level supervisor Jake Myers unlawfully interrogated employee Thomas Wallace on January 28 by allegedly asking him what he

"[thought] about the union" after watching a video regarding union authorization cards. J.A. xx (BD1 at 2 n.9; TR1 649:14-650:5). It is undisputed that Myers is a front-line supervisor, and that the conversation was brief and occurred in the open. There is no claim that Myers repeated his purported questioning or that he committed any other violations. Moreover, while the ALJ noted that Wallace "gave a noncommittal response," the fact is that Wallace ***was*** noncommittal at that time. Wallace testified that he was not even aware of the Union campaign at that point. J.A. xx (TR1 649:14-16). He further testified that he gave Myers an honest response, noting unionized workplaces often had better benefits and that he needed to do his own research before forming an opinion. J.A. xx (TR1 649:14-650:5).

The Board also held that Shamrock Safety Manager Joe Remblance unlawfully interrogated Steve Phipps and another individual who were talking in an aisleway when he asked what they were discussing and whether they were on break. J.A. xx (BD2 n.9; TR1 620:2-621:9). Consistent with his normal practice, Remblance stayed for 3 to 4 minutes to make "small talk." J.A. xx (*Id*; RX 1 at 43). As dissenting Member Kaplan noted, this incident amounted to nothing more than an innocuous conversation between a supervisor and two employees who were on break. J.A. xx (BD1 2 n.7)

The Board's finding of unlawful interrogation by first-level Sanitation Supervisor Karen Garzon again ignores both the context of the conversation and the realities of the workplace. J.A. xx (BD 2 n.9). Garzon testified that she was sitting in the break room having lunch with two Spanish-speaking sanitation employees when Phipps

approached their table and handed each of them a union flyer. J.A. xx (TR1 872-874). One of the employees handed Garzon her flyer and asked her to translate it. J.A. xx (TR1 875-876). Garzon offered the flyers back to the two employees, and neither employee accepted. J.A. xx (TR1 626, 876). Garzon then asked "do you guys want it back" and the employees responded "no." J.A. xx (TR1 876).

The Board erred in adopting the ALJ's finding that these conversations amounted to unlawful, coercive interrogation of employees regarding their Union sympathies. Each conversation involved a low-level supervisor casually conversing with employees in the open, with no threats or intimidation. As the Board has recognized, even treating instances of "casual questioning concerning union sympathies" as a violation of the Act "ignores the realities of the workplace." *Rossmore House*, 269 NLRB 1176, 1177 (1984). The Board's findings of interrogation are accordingly erroneous. *See Toma Metals Inc.* 342 NLRB at 789 (no unlawful interrogation in low-level supervisor's brief discussion with employee on shop floor).

G. The Board's Finding That Shamrock Unlawfully Solicited Grievances Ignores Shamrock's Substantial and Undisputed History Of Soliciting Employee Feedback.

The Board's finding that Shamrock Human Resources Manager Natalie Wright and Warehouse Manager Ivan Vaivao unlawfully solicited employee grievances on January 28 and February 5 is not based on substantial evidence. J.A. xx (BD 1 n.5). Steve Phipps admitted that Shamrock conducted "hundreds" of employee feedback meetings during his 20 years with the Company. J.A. xx (TR1 575:9-14). Phipps further

acknowledged that he has frequently taken advantage of Shamrock's open-door policy to discuss issues with management, and that management representatives (including Wright) have approached him for feedback. J.A. xx (TR1 572-84). Because an employer is permitted to continue any past practice of soliciting employee feedback during a union campaign, the Board's finding of a violation is meritless. *Walmart Inc.*, 339 NLRB 1187, 1187 (2003) (employer may continue to solicit grievances during a union campaign as it did prior to the start of the union campaign).

Moreover, after admitting the lack of any "direct evidence that the Company knew" of the Union campaign on January 28, the ALJ ***presumed*** that Shamrock "suspected" union organizing in Phoenix as of that date because employees were shown a video concerning union authorization cards. J.A. xx (*Id.* at 7:31-35). The Board tacitly adopted this assumption in its decision. Engdahl, however, specifically told employees that the January 28 meeting was held because of organizing activity at Shamrock's *Southern California facility*. J.A. xx (TR1 894:1-9; GCX 8(a), 1). No evidence was presented to the contrary. The Board's findings should be rejected on this basis as well.

H. The Board's Holding That Shamrock Unlawfully Promised And Granted Benefits Lacks Any Foundation In The Evidence.

1. Engdahl's April 29 Confirmation That No Layoffs Would Be Conducted Was Consistent With The Company's Longstanding Message And Timed Based On Shamrock's Annual Slow Period.

The Board found that Shamrock violated the Act by announcing on April 29 that it would not lay off employees for the 2015 summer slowdown. This finding ignores

critical, unchallenged testimony. For example, it is undisputed that Shamrock told employees immediately after a summer 2014 layoff that a layoff in the summer of 2015 would be avoided if at all possible. J.A. xx (TR1 737:20-738:17, 739:2-9, 757:5-17). The company, in fact, stopped hiring in December 2014, well before Shamrock knew of union organizing at the Phoenix facility. J.A. xx (TR1 757:20-758:9). It is furthermore undisputed that the Company continued to keep employees apprised of its efforts to avoid a 2015 layoff throughout the remainder of 2014 and the beginning of 2015. J.A. xx (TR1 757:5-17). The April 29 announcement—made on the literal eve of Shamrock's annual slow season that begins on Mother's Day—therefore was not unlawful. J.A. xx (TR1 233:1-24).

2. The May 2015 Wage Increases Were Unrelated to the Union's Organizing Activity.

The Board further erred in finding that Shamrock granted unlawful wage increases in late May 2015 to employees in the Returns, Will Call and Sanitation departments, and one of Shamrock's thrower classifications. J.A. xx (BD1 at 2; TR1 559:9-12). To establish an unlawful wage increase, General Counsel must prove that the employer was aware of organizing activity among the affected employees, and granted the increase specifically in response to that activity. *See*, *e.g.*, *Field Family Assocs., LLC*, 348 NLRB 16, 18 (2006); *see also Desert Aggregates*, 340 NLRB 289, 290 (2003). Here, General Counsel offered no evidence that Shamrock was aware that the employees affected by the wage increase were employees affected by organizing activity, such as a

notification from the Union to Shamrock as to which employees it intended to organize. The Board's decision is therefore not supported by substantial evidence. Moreover, its ruling on this allegation is the result of the overbroad sanctions that the ALJ awarded to the General Counsel, and should be rejected on that basis as well.

I. Lerma's Claim That Supervisor Dave Garcia Searched His Belongings Is Insufficient To Establish Unlawful Surveillance.

The Board erred in finding that Shamrock engaged in unlawful surveillance based on the claim that supervisor Dave Garcia looked through a generic, Company-issued clipboard that employee Mario Lerma left unattended on his assigned forklift. J.A. xx (Compl. ¶ 5(v)(1)-(3)). Garcia, however, picked up the clipboard only to review the schedule, which was sitting in plain sight on a parked, unattended forklift. J.A. xx (TR1 945-948, 951). Both Lerma and Garcia confirmed that anyone who walked by the forklift would have seen the clipboard. J.A. xx (TR1 838). Thus, even if the review of materials on a clipboard could constitute surveillance, the General Counsel's allegation would fail. *Jewish Home for the Elderly of Fairfield Cty.*, 343 NLRB 1069, 1084 (2009) (citing *Roadway Package Sys.*, 302 NLRB 961 (1991))("Where employees are conducting their activities openly on or near the employer's premises, open observation of such activities is not unlawful.").

In addition, Garcia was not aware that the clipboard or the forklift belonged to Lerma, as he was new to the department and had not learned which forklifts each employee typically used. J.A. xx (TR1 940, 943, 947, 951, 958). Furthermore, forklift

drivers are not guaranteed the same forklift for every shift. J.A. xx (TR1 940). The General Counsel's surveillance allegation accordingly fails on the additional basis that Garcia could not have been surveilling Lerma if he was not aware that the forklift and clipboard belonged to him.

The Board also adopted the ALJ's finding that Garcia subsequently admitted to Lerma that he had been looking through the clipboard for union cards. J.A. xx (TR1 951). But, Garcia only looked at the schedule and was not aware of the Union's purported activity that allegedly made him suspicious. J.A. xx (TR1 951, 962). The Board's decision likewise is not supported by substantial evidence on this point.

J. General Counsel Is Unable To Establish The Elements Necessary To Support Its Claims Of Unlawful Discipline.

The Board's finding that Shamrock unlawfully discharged Thomas Wallace and disciplined Mario Lerma in retaliation for protected activity incorporates the ALJ's unfounded speculation and mischaracterization of the relevant testimony. Claims of unlawful retaliation require General Counsel to prove that the employee's protected conduct as a motivating factor in the adverse action by showing the employee engaged in protected activity, the employer had knowledge of the protected activity, and bore animus against the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB at 961.

If the General Counsel establishes its *prima face* case, the employer still may avoid liability by establishing that the employee would have received the same discipline even

in the absence of the protected conduct. *Security U.S.A.*, 328 NLRB 374 (1999); *DSI Enterprises, Inc.*, 311 NLRB at 444. Although General Counsel may challenge the employer's stated motive as pretextual, the employer is not required to establish that the employee actually engaged in misconduct. Rather, the employer need only establish an honest belief that misconduct occurred. *See Yuker Constr. Co.*, 335 NLRB at 1073 ("[The employer] 'shot from the hip' and acted hastily on a mistaken belief, but . . . such conduct does not constitute an unfair labor practice.").

1. The Board's Finding Of Pretext In Regard To Wallace's Discharge Is Based On Improper, Unsupported Speculation

Wallace was discharged for leaving a mandatory employee meeting in March 2015 without permission before the meeting adjourned. The Board adopted the ALJ's conclusion that Shamrock's stated motive for Wallace's discharge was pretextual, and that Wallace was actually discharged in retaliation for asking a question about health insurance during the mandatory meeting.[14]

In finding a violation, the Board adopted the ALJ's observation that Shamrock offered "shifting" and "false" reasons for Wallace's discharge. J.A. xx (BD1 at 2 n.11; ALJ-JDW at 40: 12-16). The ALJ's observation, in turn, was based on a reference in Shamrock's position statement to Wallace "interrupting" a company executive before leaving the mandatory meeting. J.A. xx (*Id.* at 40:18-27; 41:1-20). During trial, General

[14] The ALJ also held that Wallace was terminated for his largely non-existent Union activity of which Shamrock was not aware. The Board did not adopt this finding, and it will therefore not be addressed herein. *See* J.A. xx (BD1 at 2 n.11).

Counsel introduced a surreptitious audio recording of the March 31 meeting made by Phipps, which does not appear to capture an interruption by Wallace. J.A. xx (*Id.* at 36:27).

Unlike the ALJ, however, Shamrock did not have the benefit of carefully listening to the audio recording as many times as needed. Rather, the position statement was drafted by counsel more than two months after the fact based entirely on witness recollections at that time. The ALJ's exaggerated emphasis of this point was erroneous, and the Board adopted his error by adopting his findings.

The Board further erred in adopting the ALJ's dismissal of Human Resources Vice President Vince Daniels' testimony that he made the decision to discharge Wallace alone. J.A. xx (*Id.* 41:21-42:21). Notably, General Counsel did not introduce any direct evidence to contradict Daniels. Yet, the ALJ rejected his testimony as "inherently unbelievable" based on Daniels' purported statement that he typically is not involved in terminations.

This finding mischaracterizes Daniels' testimony. Daniels actually testified that he typically is not "in the bowels of the ship," meaning that he usually does not visit the warehouse. J.A. xx (TR1 716:20-717:3). He further testified that he "just happened to be there that day and saw" Wallace leave the meeting. J.A. xx (TR1 717:2-3). Thus, the ALJ's reliance on Daniels' typical lack of involvement in discharges improperly ignored Daniels' testimony as to the reason for his involvement in Wallace's case.

The Board similarly erred in regard to Warehouse Manager Vaivao's purported remark (described in Wallace's testimony) that Norman and Kent McClelland made the decision to discharge Wallace. J.A. xx (TR1 662). Even if Vaivao had made the comment (which he did not),[15] there was introduced no evidence to show that Vaivao had personal knowledge of who made the decision to discharge Wallace. Vaivao, in fact, testified without contradiction that he was not involved in the decision and that he had no idea who was. J.A. xx (TR1 154). The ALJ erred by ignoring this testimony, and the Board's adoption of his findings should be rejected.

Perhaps recognizing the tenuous basis for his rejection of Daniels' testimony, the ALJ further criticized Daniels for not questioning Wallace regarding the reason he left the meeting. J.A. xx (ALJ-JDW 42:6-21). But, while the ALJ may not have agreed with Daniels' view that the situation was "cut and dried," J.A. xx (TR1 721:10-20), that fact is irrelevant. "An employer may discharge [an] employee for any reason, whether or not it is just, as long as it is not for protected activity." *Yuker Constr. Co.*, 335 NLRB at 1073 (quoting *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 550 (6th Cir. 1993)).

[15] While the ALJ purported to adopt Wallace's version of events over Vaivao's denial as a credibility determination, he did not base this finding on the demeanor of the witnesses or any other proper factor. Moreover, despite dismissing Daniels' testimony as "inherently unbelievable," the ALJ did not apply that same standard to the notion that the CEO and Chairman of the Board of a $3 billion company with more than 3,000 employees would be involved in deciding whether to discharge an hourly worker.

2. Lerma Was Not Subject To An Adverse Employment Action

The Board's finding that Engdahl and Vaivao unlawfully disciplined employee Mario Lerma for protected activity during a May 5 meeting is unsupported. Though ignored by both the Board and the ALJ, Engdahl testified that he called the meeting after receiving reports that Lerma and other forklift operators were either refusing to deliver or delaying delivery of items ("drops") to order selectors who did not sign Union authorization cards. J.A. xx (TR1 238:16-240:2, 743:5-12, 746:11-748:16). Rather than disciplining Lerma, Engdahl simply suggested that he should not let the situation ***escalate*** to the point of discipline. J.A. xx (*Id.*) Lerma understood what Engdahl was referencing without asking for details, and did not deny that drops were delayed. *See* J.A. xx (GCX 13(a)).

As explained above, a claim of unlawful retaliation requires a showing of both protected activity and an adverse action. General Counsel failed to establish either element in regard to its claim on behalf of Lerma. Punishing coworkers for deciding not to sign a union authorization card is not protected activity, and Lerma was never disciplined during the May 5 meeting. The Board's decision to the contrary is erroneous.

II. STEVE PHIPPS WAS NEITHER DISCIPLINED NOR TREATED DISPARATELY BASED ON HIS PROTECTED ACTIVITIES

A. Shamrock's Enforcement of its Break Policy Was Unlawful

The Board incorrectly adopted the ALJ's erroneous findings that Shamrock began enforcing its break policy in January 2016 to preclude Phipps from discussing

union issues with coworkers from other shifts. J.A. xx (BD2 at 1 n.1). The Board's adopted reasoning is arbitrary and its decisions on these claims should be vacated.

1. The Board Misunderstood Shamrock's Operation and Break Policy.

First, the Board's adoption of the ALJ's recommendation is arbitrary because it misunderstands how Shamrock divided its Phoenix warehouse into inbound and outbound operations on the day in question—January 26, 2016. J.A. xx (ALJ-ABT 3:35-37).[16] With a brief exception in 2015, Shamrock's Phoenix facility has ***always*** been separated into inbound and outbound operations. The change implemented on January 24 pertained only to the forklift operators who were split back into separate inbound and outbound crews after being combined in January 2015. J.A. xx (TR2 221-24, 231, 298, 300, 391, 662, 712-15).

The ALJ furthermore found that all employees in the Phoenix warehouse were required to take their breaks together. J.A. xx (ALJ-ABT 6:39-40). Neither Shamrock nor General Counsel asserted such a claim. Rather, employees in the various positions on each crew (*i.e.*, inbound and outbound) are—and always have been—required to take their breaks together during each shift. J.A. xx (TR2 102, 269, 808, 357, 785).

These errors call into question whether the ALJ misunderstood other testimony as well. Specifically, the ALJ's findings, adopted by the Board, do not consider the operational reasons that Phipps, as a forklift driver, may have experienced more

[16] The decisions of Administrative Law Judge Amita Baman Tracy in 28-CA-150157 will be referred to as "ALJ-ABT.

flexibility in taking breaks in December 2015, J.A. xx (BD2 at 7), which were explained by inbound supervisor Gomez who testified without contradiction that, when the inbound and outbound forklift teams were combined in 2015, supervisors typically directed forklifters to *stagger* their breaks to avoid a situation in which no forklifter was available. J.A. xx (TR2 826-31). Gomez further testified that, once the teams were again split up into inbound and outbound crews in January 2016, forklift availability was no longer a concern. J.A. xx (*Id.*). Thus, Gomez' instruction to his inbound forklift team reminding them that they were to take breaks with the rest of their crew. J.A. xx (TR2 399). The ALJ, and subsequently the Board, completely ignored this unchallenged testimony, despite the fact that it relates directly to the claim that Shamrock's break policy was not enforced until the forklifters were re-separated. Yet, Shamrock's history of enforcing its break policy requiring crews to break together is a central issue in this matter, and the Board's misunderstanding of this history makes its finding—that the break policy's enforcement constituted an unfair labor practice—arbitrary.

2. The Board's Nebulous Finding that Shamrock Changed Enforcement of Its Break Policy Ignores Contradictions in the Testimony of General Counsel's Witnesses

The Board's finding of a violation in regard to Shamrock's "changed" enforcement of its break policy also suffers from an impermissible degree of ambiguity. The Board found that employees previously were afforded "some degree of flexibility" in their break schedules. J.A. xx (BD2 at n.1). The Board further held that Shamrock restricted this flexibility beginning on January 24, 2016, when the consolidated forklift

crew was split back into inbound and outbound teams. J.A. xx (ALJ-ABT 16:37-17:3). Yet, the Board failed to explain the extent of the flexibility that employees purportedly enjoyed prior to 2016, or the degree to which it was allegedly restricted when the forklift crews were split. This flaw is not surprising in light of the equivocal evidence upon which the Board improperly relied and the Board's failure to understand the operations or the impact of the operational changes on the forklift crew.

Specifically, the Board's conclusion that Shamrock had not previously enforced its break policy was based on the testimony of Phipps and Scheffer. J.A. xx (ALJD-ABT 16:6-19). In regard to Scheffer, the ALJ found his testimony to be credible based on her understanding that "he voluntarily stepped down" from a supervisor position and had "no obvious interest in this proceeding." J.A. xx (ALJ-ABT 8 n.16-17). But, Gomez testified without contradiction that Scheffer was ***involuntarily*** demoted after 18 years as a supervisor. J.A. xx (Tr. 833). The Board's finding is therefore arbitrary and Scheffer's testimony is not reliable.

Even if credited in full, Scheffer's testimony does not support the Board's finding of a violation. Scheffer testified that he adjusted his break times based on operational needs, but offered no testimony or other evidence to suggest when exactly his did this (outside of prior to January 2016) or that management was aware of this practice. Notably, the non-conveyable area where Scheffer worked is "tucked away" by itself in the back of the warehouse. J.A. xx (TR2 404-05, 834). Further, the ALJ acknowledged that in January 2016, Scheffer was also instructed to take his breaks at designated times.

J.A. xx (TR2 652). This testimony does not support a finding that Shamrock relaxed enforcement of its break policy.

Phipps' testimony concerning the purported enforcement change was both equivocal and contradictory. On direct examination, he testified that employees previously were able to combine and take their breaks as they saw fit, so long as they did not interfere with operation. J.A. xx (TR2 665). But, on cross-examination, Phipps backed away from this testimony:

> Q. (*By Respondent's Counsel*) [L]et's talk about 2015 and before. I think your testimony was people could take breaks when they wanted.
>
> A. (*By Mr. Phipps*) ***I wouldn't go that far***. I believe what I said was that breaks were -- certain times were acknowledged as break times but if you needed to work through a break to expedite business or you needed to change up, as long as that didn't affect business, you could do that.

J.A. xx (TR2 715-16)(emphasis added). Phipps later admitted on cross examination that, even ***prior*** to January 2016, he "was directed by [supervision in his assigned area] as to when to take break." J.A. xx (TR2 736). Notably, this is the same policy that is currently in effect—employees are required to take breaks as scheduled unless otherwise directed by supervision.

Phipps' testimony was contradictory in other respects as well. For instance, when initially asked on cross-examination if employees had "normal break times," Phipps initially responded that they did not:

> Q. (*By Respondent's Counsel*) [G]oing back to the issue of breaks, the employees on each [crew] have normal break times, correct?
>
> A. (*By Mr. Phipps*) ***No***.

J.A. xx (TR2 726)(emphasis added). But, when it became clear that he was about to be impeached with prior trial testimony, Phipps changed his answer and agreed that employees do, in fact, have normal break times:

> Q. (*By Respondent's Counsel*) So again, I -- just to make sure that it's clear, the employees on each crew have normal break times, right?
>
> A. (*By Mr. Phipps*) ***Yes, they have normal break times***.

J.A. xx (TR2 727-28)(emphasis added); *see also* J.A. xx (TR2. 731). Meraz corroborated this fact. J.A. xx (TR2 623).

In addition to his various equivocations, the only specific instances that Phipps described in which he took his breaks outside of the scheduled time periods all pertained to operational issues. J.A. xx (TR2 680). Phipps did not testify that employees were able to take breaks outside the scheduled times for personal reasons. He furthermore failed to explain precisely how Shamrock changed the enforcement of its break policy in January of 2016.

Viewing his trial testimony in total, Phipps essentially admitted (i) that enforcement of the policy has ***not*** changed, (ii) that supervisors have always directed warehouse associates in regard to when they can take lunches and breaks, and (iii) that deviations from the break policy have only been permitted for operational—not

personal—reasons. By adopting the ALJ's decision, the Board ignored these admissions entirely, and offered no explanation for doing so. The Board's finding of a violation is therefore arbitrary and unsupported by substantial evidence.

3. The Board Failed To Show That Shamrock Knew Of Phipps' Union Activities During His Unscheduled Breaks

The Board adopted the ALJ's finding that *Wright Line*'s knowledge element was satisfied in regard to General Counsel's break policy claim based largely on its conclusion that Shamrock knew of Phipps' union sentiments. J.A. xx (ALJ-ABT 16:6-19). In doing so, the Board relied on the ALJ's finding that Shamrock used the break policy "to prevent Phipps from talking to employees about the Union during break times other than his own." J.A. xx (ALJ-ABT 17:22-23). But, while Shamrock's witnesses acknowledged that they knew of Phipps' support for the Union, the General Counsel produced no evidence that Shamrock had knowledge of Phipps' use of unscheduled breaks to hand out flyers and engage in other union activity. As a result, there is no basis to assume that Shamrock would expect enforcement of its break policy to curb Phipps' ability to communicate with other employees. Accordingly, the General Counsel failed to establish the *Wright Line* knowledge element, and its claim must fail. The Board erred in holding to the contrary.

4. The ALJ's Reliance On Timing To Find Animus Was Misplaced

The Board found that Shamrock's enforcement of its break policy was motivated by union animus. In doing so, the Board adopted the ALJ's erroneous determination

of animus based upon the timing of the incidents involving Phipps, that Phipps distributed a flyer in December 2015 concerning a leadership change at the Phoenix facility, approximately one month prior to the separation of the forklift team into inbound and outbound crews. J.A. xx (ALJ-ABT 17:5-25). But, the ALJ's reliance on timing pre-supposes that Shamrock was aware that Phipps prepared the December flyer. General Counsel produced no evidence to establish such knowledge.[17] The ALJ's reliance on timing therefore is misplaced.

The General Counsel sought to overcome this failure by pointing to Shamrock's general knowledge that Phipps supported the Union and distributed flyers. This attempt, however, is unavailing. As the ALJ noted, Phipps' leafletting and other organizing activities occurred throughout 2015. J.A. xx (ALJ-ABT 17:10-17). Thus, if animus was to be established based on timing, the relevant time period would begin in January 2015—more than a year before the alleged change in enforcement. This time interval is too remote to support an animus finding. *See Cardinal Home Products, Inc.*, 338 NLRB 1004, 1009 (2003) (three months between union representation election and employee reassignment was too long to establish inference of a nexus between the two

[17] As discussed above, the General Counsel furthermore failed to demonstrate that Shamrock was aware that Phipps was taking breaks outside the designated time periods to engage in union activity. This larger failure is equally fatal to the ALJ's reliance on timing to establish animus.

events); *Central Valley Meat Co.*, 346 NLRB 1078 (2006) (schedule change that occurred 6 months after strike was too remote in time to suggest animus).

5. The Board's Finding of Pretext Ignored Undisputed and Unchallenged Evidence About the Reason for Shamrock's Break Policy

The Board similarly erred in finding that Shamrock's justification for its enforcement of the break policy was pretextual. In reaching this conclusion, the Board acted arbitrarily by misstating the legitimate business reason that Shamrock offered in support of its break policy.

The Board accepted the ALJ characterization of Shamrock's motive in enforcing the policy as being limited to "an intention to protect associates from conflicting demands." J.A. xx (ALJ-ABT 17:27-32). But Vaivao and O'Meara both testified consistently that the policy was intended to maintain the work flow in the inbound and outbound operations.[18] J.A. xx (TR2 273, 303, 785, 809). The change avoided issues in both outbound and inbound such as having pallets sit unattended on the inbound dock if receivers kept working while the inbound forklifters were on break or having no pallets to remove from the dock if the receivers took their break while forklifters

[18] O'Meara and Vaivao's uncontroverted testimony that the Phoenix operation would be disrupted if employees were able to take their breaks as they wish is independently sufficient to dismiss the claim concerning enforcement of the break policy, particularly in light of the NLRB's failure to establish that Shamrock was aware of Phipps' union activities during his unscheduled breaks. An employer is not obligated to suffer operational disruption to facilitate union solicitation. *See Gallup, Inc.*, 349 NLRB 1213, 1240 (2007).

continued working. Loaders similarly would have no product to load if the selectors were not working.[19] General Counsel did not introduce a shred of evidence to suggest that these inherently rational operational concerns lack merit. The Board's finding of pretext is accordingly arbitrary and should be rejected.[20]

6. The Board Erred in Finding that Shamrock's Enforcement of Its Break Policy Was Unlawful in Regard to Individuals Other Than Phipps

In addition to the above errors, the Board's adopted ALJ finding of a violation in regard to Shamrock's enforcement of its break policy is overbroad. The General Counsel asserted this claim only as a Section 8(a)(3) violation, and not as an independent Section 8(a)(1) claim. But, the General Counsel identified only two employees (Phipps and Scheffer) who previously took their breaks outside the scheduled times. Of these two individuals, Phipps was the only one alleged to have engaged in union activity. Moreover, Meraz—General Counsel's own witness—testified that "everybody" on the

[19] The ALJ's erroneous finding that Shamrock did not separate the warehouse into inbound and outbound crews until January 24, 2016 strongly suggests that she misunderstood this testimony.

[20] The Board's failure to demonstrate that Shamrock was aware of Phipps' union activities during his unscheduled breaks further undermines the ALJ's reasoning in regard to pretext. In holding that Shamrock's stated reasons for enforcing its break policy were pretextual, the ALJ found that Shamrock's enforcement of the break policy was motivated by a desire "to prevent Phipps from meeting with employees on other breaks." J.A. xx (ALJ-ABT 17:39-40). But, as explained above, there is no evidence that Shamrock was ***aware*** of Phipps' meetings with employees on other shifts during his unscheduled break times. Thus, in short, the pretext finding erroneously assumes that Shamrock was motivated by knowledge never proven to be in its possession.

inbound side of the warehouse operation takes breaks together. J.A. xx (Tr. 623). Further, the ALJ acknowledged that Shamrock's assertion that "they enforced the break schedule with all employees" appeared legitimate. Yet, the ALJ ignored Meraz's testimony and found that enforcement of Shamrock's break policy was unlawful in regard to ***all*** employees. Thus, the Board's decision should be vacated.

B. Phipps Was Not Subjected to "Closer Supervision"

1. The Board Misstated and Misapplied the Burden of Proof on General Counsel's "Closer Supervision" Claim

The Board, by adopting the ALJ's recommendation, acted contrary to law by reversing the burden of proof on the closer supervision claim and arbitrarily by ignoring critical, undisputed evidence.

The Board held that a claim of "closer supervision" does not require General Counsel to submit evidence concerning the typical level of supervision but can prevail on a claim of closer supervision simply by "prov[ing] that Respondent's actions were based on a discriminatory motive." J.A. xx (ALJ-ABT 18:44-45). This assertion is circular. Inherent in the ALJ's observation above is the notion that Shamrock ***did something***, took some "actions" that it ordinarily would not have taken because the alleged discriminate engaged in union activity. *See General Die Casters, Inc.*, 358 NLRB at 746; *Liberty House Nursing,* 245 NLRB at 1201. By definition, that burden requires the General Counsel to establish Shamrock's ordinary course of conduct. *Id.*

The Board then compounded the error by noting that Shamrock "failed to produce any evidence that prior to January 24 Phipps failed to take his break as scheduled thereby leading me to infer that Respondent closely supervised Phipps in January and February." J.A. xx (ALJ-ABT 18:32-34). Thus, the Board assumed that Shamrock supervised Phipps more closely in January and February because it did not establish that it caught him taking unauthorized breaks prior to that time period. This assumption is unsupportable and Shamrock does not bear the burden to disprove General Counsel's claims.[21]

Likewise, the Board's decision is arbitrary because the General Counsel offered no evidence to establish—or even suggest—that either Gomez or Nicklin (the two supervisors allegedly involved) were following Phipps or interacting with him in anything other than an ordinary fashion. There was no evidence to suggest that Gomez would not ordinarily visit the breakroom or that Gomez and Nicklin would not ordinarily walk the warehouse floor just as break-time was ending.

Regardless, Shamrock offered unchallenged evidence demonstrating that Phipps was not subjected to a more stringent level of supervision. J.A. xx (TR2 272, 273, 409, 437). Gomez and Nicklin testified without contradiction that they walk the warehouse floor constantly—indeed, Gomez records 7 miles per shift on his smart watch. J.A. xx

[21] This assertion also fails to consider that prior to January 2016, while inbound and outbound forklifters were combined into one crew, they were told to stagger their breaks for business reasons.

(TR2 409, 437, 449). The Board's decision to the contrary is erroneous because it conflicts with this uncontroverted testimony. *See*, *e.g.*, *American Furniture Co.*, 239 NLRB at 413.

2. Gomez's January 26 Email Does Not Establish Closer Supervision of Phipps

The Board's conclusion that Shamrock engaged in closer supervision is arbitrary. The Board found that Gomez engaged in closer supervision of Phipps, in large part, based on his January 26 email to other managers describing the incident in which he spoke to Phipps and Aja about taking their breaks as scheduled. J.A. xx (ALJ-ABT 18:16-24; GCX 16). The ALJ's recommendation adopted by the Board emphasized that Gomez sent emails concerning other employees "only to one or two other supervisors." J.A. xx (ALJ-ABT 18:20-23).

This reasoning is flawed in multiple respects. First, the "other emails" referred to by the ALJ were not sent in comparable circumstances. J.A. xx (GCX 17 & 18) Phipps and Aja were both instructed to delay their breaks by individuals outside their chain of command. J.A. xx (TR2 390-98, 678; GCX 16). Gomez sent the email to insure that other supervisors were alerted to this break in the chain of command. The employees referred to in other emails, GCX 17, on the other hand, were not instructed to delay or adjust their breaks outside the chain of command. Rather, they did so on their own volition. The email reflected in GCX 18 is irrelevant because it was a response by Gomez to a request by shipping to use an inbound forklifter (Scheffer). Gomez

stated in his response that Scheffer would be available after taking his break. The ALJ's reliance on these emails to demonstrate closer supervision of Phipps thus was in error.

Second, the Board ignored the undisputed fact that Gomez's January 26 email was sent in the context of Shamrock's decision to return to separate inbound and outbound forklift teams. J.A. xx (TR2 390-91). The forklift teams had been combined in January 2015, when the inbound function first became a 24-hour per day operation. J.A. xx (TR2 221-22). Thus, at the time the teams were re-split in 2016, there had never been a separate inbound forklift team with 24-hour coverage. Gomez understandably wanted to insure that the entire management team was in agreement on when and how they should share forklift resources in the future. Given these unusual circumstances, the Board's inference of an unlawful motive from the purportedly "unusual" nature of Gomez's January 26 email is arbitrary.

Third, the ALJ omitted crucial details concerning Gomez's explanation for the email distribution list. Gomez, in fact, specifically explained why each individual was included on the email. Gomez copied his fellow inbound supervisors (Johnny Banda, Dave Garcia and Roy Shreeve) to alert them that the shipping side of the operation was continuing to use inbound forklifters rather than the newly created outbound forklift team. J.A. xx (TR2 397). He copied Armando Gutierrez, the Phoenix shipping manager, to remind him that shipping should not use inbound forklifters without communicating with the inbound supervisors. J.A. xx (TR2 392). Gomez copied Vaivao and Nicklin so

that they were aware that the purchasing department was pressuring Aja to close out a produce truck rather than taking his break at the designated time. J.A. xx (TR2 398).

Fourth, Gomez's January 26 email itself reflected the same concerns regarding both Aja and Phipps. J.A. xx (GCX 16). Phipps was not singled out or treated differently in any way.

General Counsel offered no evidence to rebut this testimony. The Board and ALJ similarly offered no basis for finding that it lacked credibility or any other reason to discount it. As a result, the Board's reliance on Gomez's January 26 email to find a violation was arbitrary.

3. The Board's Finding of Closer Supervision in Regard to Phipps' February 11 Discussion with Nicklin and Gomez Is Based on a *Non Sequitur*

The Board also held that Nicklin and Gomez engaged in "closer supervision" of Phipps on February 11, when they reminded him to take his breaks as scheduled. J.A. xx (BD2 at 1 n.1). The Board found that the General Counsel established this claim simply by showing that Phipps distributed a union handout two days earlier. J.A. xx (*Id.*). In short, the Board found a supervision violation simply because Phipps was caught in an infraction of the break policy shortly after he purportedly engaged in protected activity. But this coincidence is insufficient because there is no evidence to suggest that Nicklin or Gomez's response was non-typical.

The Board's reasoning is arbitrary for another reason as well. Specifically, the General Counsel failed to establish that Shamrock was aware of Phipps' alleged

distribution of flyers on February 9. While company witnesses acknowledged that they had seen copies of the flyer, none testified that they were aware that *Phipps* distributed it. Phipps similarly did not provide any testimony to establish this fact. Thus, the Board again arbitrarily assumed that Shamrock was motivated by knowledge that there is no evidence it had. This assumption is unsupportable, and the Board's finding was arbitrary.

C. The Board Erred in Finding Phipps Was Subjected To Unlawful Discipline During His February 11 Discussion With O'Meara And Vaivao

1. The Board Erred in Holding That the February 11 Discussion Was Disciplinary

The Board erred in finding that the February 11 discussion was disciplinary. O'Meara and Vaivao testified that the meeting was nothing more than coaching, no documentation created in Phipps' employee file or elsewhere. J.A. xx (TR2 424, 810). This is reflected in Phipps' surreptitious audio recording where Phipps asked whether he was being disciplined and O'Meara replied that he was not. J.A. xx (GCX 22(a), 22(b)). Phipps confirmed this fact under oath in a declaration and at trial. J.A. xx (TR2 724, 750-51). Phipps additionally confirmed that he was not asked to sign any documentation to memorialize the February 11 discussion. J.A. xx (TR2 724).

Nonetheless, the Board found that Phipps was disciplined based on the fact that O'Meara used the word "counsel" during the February 11 meeting, and Shamrock's employee handbook lists "counseling" as the first step in the discipline process. J.A. xx

(GCX 2). This hyper-technical reasoning is insufficient to escalate the February 11 meeting into a violation of the Act. O'Meara and Vaivao testified that, regardless of the handbook, they do not issue disciplinary counseling. J.A. xx (TR2 424, 810). In eight years as Operations Manager in both New Mexico and Phoenix, O'Meara has ***never*** signed a disciplinary notice of counseling despite the fact that he signs off on every discipline. J.A. xx (TR2 784). In practice, discipline begins with a verbal warning.

Phipps affirmed in a prior sworn affidavit that, in practice, a verbal warning is the first step in the disciplinary process. J.A. xx (TR2 724-26). While Phipps attempted to retreat from his prior affidavit at trial, he admitted that this testimony was consistent with his experience and observations in the warehouse. J.A. xx (*Id.*); *see also* J.A. xx (TR2 749). In Phipp's testimony, policy is "what you enforce, not what's written." J.A. xx (TR2 684, 724).

Notably, ALJ's reasoning that Shamrock's disciplinary policy trumped both its practice and O'Meara's assurance to Phipps that he was not being disciplined is inconsistent with her earlier reasoning concerning breaks. The ALJ found that Shamrock's purported practice related to breaks superseded its policy. Yet, in regard to counseling, the ALJ found that Shamrock's policy superseded its undisputed practice. This contradiction undermines the ALJ's finding that the February 11 meeting was disciplinary. Because *Wright Line* requires a showing of an adverse employment action as part of General Counsel's *prima facie* case, its retaliation claim related to Phipps must be dismissed.

2. The Board Failed To Establish Animus or Any Nexus Between Phipps' Protected Activity and The February 11 Discussion

Consistent with Board Member Kaplan's dissent, the Board's finding of animus in Phipps' February 11 discussion with O'Meara and Vaivao based in part on a February 11 letter to associates from Tim O'Meara, is arbitrary. J.A. xx (ALJ-ABT 20:26-29; GCX 23). As reflected in the document, O'Meara sent the February 11 letter primarily to introduce himself as the new Operations Manager for the Phoenix warehouse. J.A. xx (*Id.*). While O'Meara remarked that the Union was unable to gather sufficient support for an election, such an innocuous and factual observation falls short of establishing unlawful animus. Without commenting favorably or unfavorably, O'Meara was simply making an observation concerning the employees' apparent sentiment about the Union.

The Board also acted arbitrarily in adopting the ALJ's reliance on timing to support a finding of animus, reasoning that the February 11 discussion occurred several days after Phipps distributed a Union flyer. Again, however, Shamrock's management did not know of Phipps' involvement in distributing this flyer. Thus, like its finding of animus in regard to the General Counsel's break policy claim, the Board's finding of animus concerning the February 11 discussion is unsupported.

Even if timing were relevant, Phipps had been involved in union activities including leafletting for over a year at the time of his February 11 meeting with O'Meara and Vaivao. J.A. xx (ALJ-ABT 17:10-17). Thus, the onset of Phipps' union activities is too remote to support such a finding based simply on timing.

3. Phipps Would Have Been Treated in the Same Manner Even in the Absence of His Protected Activity

Setting aside the Board's errors in finding that General Counsel satisfied its *prima facie* burden, Phipps' own testimony confirms that he would have been instructed to take his breaks at the designated times even in the absence of his protected activity. Phipps admitted on cross-examination that inbound supervisor Johnny Banda's instruction was equally directed to fellow Shamrock employees Benny Wabbington and Brian Cook. J.A. xx (TR2 718). Neither Wabbington nor Cook are alleged to have engaged in protected activity.

Similarly, during a January 26 conversation, Gomez gave the same direction to Shamrock employee Roy Aja (who was also in the room at the time). J.A. xx (TR2 390-98). Like Phipps, Aja was taking a break after the designated time because the purchasing department asked him to finish unloading a truck so that it could leave the dock. J.A. xx (TR2 397-98). Gomez told Aja that he did not report to purchasing and that he should take his breaks as directed by supervision. J.A. xx (*Id.*).

Phipps' evasiveness when asked by Nicklin why he was not on break confirms that he understood Shamrock's break policy, that he was aware that it was enforced, and that he knew he was not in compliance. When asked by Nicklin why he was not on break, Phipps evasively responded that break time was over. J.A. xx (TR2 675). Only when Nicklin specifically asked Phipps if he had taken his 1:00 pm break did Phipps confess that he had not. J.A. xx (*Id.*). Phipps acknowledged to Vaivao and O'Meara that

taking breaks as directed was being applied equally to all associates. A trial, he also admitted that he was not singled out for taking breaks at designated times. J.A. xx (TR2 716).

Meraz testified that "everybody" on the inbound side of the warehouse operation takes breaks together. J.A. xx (TR2 623). Scheffer, who is not alleged nor has claimed to have engaged in protected activity, testified that informed him of the necessity of taking scheduled breaks. J.A. xx (TR2 652). That the break policy is applied equally to all employees is fatal to the claim that Phipps was discriminated against on the basis of his protected activity, and the Board's decision to the contrary breaks from *Mid-West Telephone Service, Inc.*, 358 NLRB 1326, 1335 (2012); *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007).

4. The Board's Determination on Pretext Concerning Phipps Is Meritless

The Board's conclusion that Shamrock's "actions were a pretext to prevent Phipps from discussing the Union with other employees" is arbitrary. J.A. xx (ALJ-ABT 20:30-31). The underlying ALJ recommendation cites no specific evidence to support this finding, and the Board failed to establish that Shamrock was aware of Phipps' union activities during his unscheduled break times. The Board's assumption that Shamrock was motivated by such knowledge cannot withstand minimal scrutiny.

III. MICHAEL MERAZ WAS LAWFULLY DISCIPLINED FOR MISPLACING A PALLET

The Board's finding that Shamrock discriminated against Meraz based on his Union activity and participation in Board processes misstates or ignores the testimony that Shamrock issued Meraz a verbal warning, the lowest level of discipline, for misplacing a special order pallet of ranch dressing. J.A. xx (BD2 at 1 n.1).

A. General Counsel Failed To Establish The Causal Link Required Under *Wright Line*.

As with Phipps, General Counsel did not establish a *prima facie* case of unlawful retaliation. In particular, for the reasons explained in Section II.A.4, General Counsel produced no evidence of animus during the trial in this matter. Nor was the General Counsel able to provide evidence of any other link between Meraz's protected activity and the verbal warning that he received. Indeed, outside of its misplaced reliance on Case No. 28-CA-150157 (also challenged on appeal), in adopting the ALJ's recommendation the Board conceded that no animus had been shown, noting that "the General Counsel need not provide specific animus toward Meraz." Absent proof of animus, the ALJ pointed only to her own determination that generalized animus was shown by Shamrock's action of "enforcing its break schedule." J.A. xx (ALJ-ABT 22:10-15). Further, given that Shamrock provided evidence of other employees who were disciplined for failure to follow the put-away procedures, the Board's

determination that Shamrock did not show others were similarly disciplined is meritless. J.A. xx (BD2, at 1 n.1]. The Board's Section 8(a)(3) findings should be vacated.[22]

B. Meraz Would Have Received the Same Level of Discipline Even Without His Alleged Protected Activity

The claims related to Meraz's discipline fail based on the undisputed evidence supporting Shamrock's *Wright Line* affirmative defense. Shamrock is not required to establish this defense by proving that Meraz was ***actually*** responsible for misplacing the special order pallet. Rather, the Company is only required to establish an ***honest belief*** that Meraz was the responsible party. *Yuker Constr. Co.*, 335 NLRB at1073 (2001). Shamrock has met this burden, and the Board's decision to the contrary is arbitrary.

There is no dispute that the special order pallet was placed in the wrong location causing 30 shorts and that Meraz was the last associate on record to touch the pallet. Meraz admitted that it was normal for Shamrock to investigate a missing pallet, that he may have been responsible for misplacing the pallet, and that such an error ***would*** constitute a failure to follow proper put-away procedures as stated on his verbal

[22] While unnecessary to the result, it should also be noted that General Counsel's 8(a)(3) claim in regard to Meraz also fails based on the lack of evidence that Shamrock had knowledge of his claimed Union activity. Notably, Meraz appeared to have exaggerated his participation in the Union's campaign. At trial, for example, he claimed to have become involved in January or February of 2015. Meraz also claimed that he began distributing flyers for the Union in May 2015. J.A. xx (TR2 506). But, in a prior affidavit signed on June 17, 2015, Meraz testified under oath that he was not very involved in the campaign and had only attempted to get a card from his brother-in-law. J.A. xx (TR2 568-69). Moreover, the General Counsel provided no evidence that any Shamrock manager was aware of Meraz's Union activity. The 8(a)(3) claim concerning Meraz fails on this basis as well.

warning. J.A. xx (TR2 582-83, 586-87, 607-08). At trial, Meraz admitted that "it was possible" that he erred because "people make mistakes." J.A. xx (TR2 586:23-24, 587:3-4). These undisputed facts demonstrate that Shamrock issued the verbal warning to Meraz—the lowest level of documented discipline possible—based on an honest belief that he was responsible for misplacing the pallet.

Furthermore, as explained during trial, Meraz was treated just like other employees, including other forklifters. Shamrock has consistently disciplined forklifters for failure to follow inventory procedures, and it provided multiple examples of employees who have been disciplined for similar errors in following protocol. *See* J.A. xx (TR2 814-15, 845-57; R. Exs. 18-19, 21-28). For example, Carl McCormack received a verbal warning for mixing the labels on two pallets of juice, a failure to follow protocol that resulting in customers not receiving their orders. J.A. xx (TR2 814-15; R. Ex. 18). George Mower, also a forklifter, received a verbal warning when he stacked pallets incorrectly and crushed a pallet. J.A. xx (TR2 854-57; R. Ex. 27(a)-(e)). Like other forklifters who were issued verbal warnings for failing to follow protocol, Shamrock issued the verbal warning to Meraz based on an honest belief that he had failed to follow protocol. He was not treated differently based on his protected activity, and thus the *Wright Line* affirmative defense applies.

C. The Board's Finding of Pretext About Meraz Is Unsupportable

The Boards finding of pretext is unsupportable. General Counsel did not identify a single employee who misplaced a pallet in a similar fashion to Meraz without being

disciplined. Further, given the undisputed facts listed above, including Meraz's own admission that he may have committed the error, the Board's decision that Shamrock's decision is not supported with substantial evidence. *See Crown Bolt, Inc.*, 343 NLRB 776, 785 (2004); *Davis Beach Co.*, 307 NLRB 915, 931 (1992); *Telex Communications*, 294 NLRB 1136, 1140 (1989).

1. The Board Has Not Articulated Any Basis for Disciplining Forklifters Differently Than Other Employees for Failure To Follow Inventory Procedures

The Board's adoption of ALJ's determination regarding pretext is predicated upon a distinction without a difference, including the Board's acceptance and reliance upon an untenable premise that Meraz's discipline was improper because he is an "inbound" forklifter and the error pertained to "outbound." Or, that Meraz was the only *forklift* operator to be disciplined for such a violation. The evidence does not support the Board's view, particularly because Shamrock has disciplined all forklifters failing to follow protocol in a similar manner.

Other employees were disciplined for not following procedures that applied to all inbound and outbound employees whenever they were tasked with putting away product. Witnesses provided uncontroverted testimony of how "putaway procedures" refers to many examples including not properly put away product which then is crushed due to falling, J.A. xx (TR2 381-382), or placing a pallet of produce in the wrong temperature zone which is then a product loss J.A. xx (TR2 382). J.A. xx (ALJ-ABT 11,

n. 29). Any distinction by the Board between forklift drivers and other employees who were disciplined for failing to follow put-away procedures is without merit.

Likewise, cases relied upon by the Board for the proposition that Meraz suffered disparate treatment because no other "forklift driver" was disciplined for not following put-away procedures are inapposite. J.A. xx (ALJ-ABT 22:1-5). In those cases, the Board found that disparate treatment where the employer had never discharged any other employees for the reason provided. In this case, Shamrock presented evidence that other employees, both forklifters and others, were similarly disciplined for the same reason, failing to follow put-away procedures

While it is unclear the extent to which the Board relied on the similarly non-compelling distinctions between inbound and outbound forklift drivers, any such reliance is flawed. Meraz testified that proper forklifting procedure is to scan the location where you physically place the pallet. J.A. xx (TR2 607-08). Meraz did not claim that the proper procedure was tied to performing inbound or outbound work. J.A. xx (*Id.*). Meraz admitted that scanning the wrong location for a pallet is a violation of the proper procedure, and he confirmed that he knew exactly what he was supposed to do. J.A. xx (*Id.*).

In finding no similar discipline, the Board fails to identify any basis for issuing a different level of discipline for failure to follow proper receiving procedures as opposed to proper put-away or replenishment procedures. As supervisor Gomez testified, the procedures all relate to movement of inventory:

> It's all the same verbiage. Pallet move, put-away. It's moving over stock. It's all – it's all the same thing, it's just it's you call it this, I call it that.

J.A. xx (TR2 863-64). While Board may not agree with this approach, it cannot establish a violation by second-guessing Shamrock's operational decisions.

2. The Board Erred in Finding that Shamrock Did Not Conduct an Adequate Investigation Regarding Meraz's Misplaced Pallet

The Board's finding that Shamrock did not conduct an adequate investigation regarding Meraz's misplaced pallet is entirely unsupported. For example, the ALJ, as adopted by the Board, observed that Vaivao and Santamaria did not consider the possibility that the misplaced pallet was the result of a scanner malfunction. J.A. xx (ALJ-ABT 11:12-15). In fact, Vaivao testified that they considered a scanner error but ruled that out because the LPN showing the scanner was working. J.A. xx (TR2 124). The scanner could not have captured the LPN if it was not working, and the evidence shows that Meraz's scanner consistently captured LPN numbers during the relevant time period. J.A. xx (GCX 6).

The Board similarly erred in finding that Vaivao and Santamaria failed to consider the possibility that another associate moved the pallet. Vaivao provided uncontroverted testimony that they considered this possibility and ruled it out based on the scan timeframe. J.A. xx (TR2 126). According to the pallet history, however, Meraz was the last associate to touch the pallet before it was lost. Moreover, the pallet was entirely for one customer as a special order, and was brought into the warehouse only

two days before it was to be delivered and thus needed minimal handling. J.A. xx (TR2 122). As such, the "chain of custody" reflected in the pallet history was clear and reliable. The foregoing situation was the "special circumstances," Vaivao was referencing in his testimony, that it was because the pallet was a special order that allowed Shamrock to trace it back to Meraz, and only Meraz. The ALJ's determination that Vaivao indicated that Meraz received the CPDR due to "special circumstances" mischaracterizes Vaivao's testimony. J.A. xx (TR2 122, 282-283, 798).

Meraz also admitted that there is no evidence of any kind to suggest that someone else was responsible. J.A. xx (TR2 609). This cuts against the Board's determination that Santamaria and Vaivao did not adequately investigate whether someone else moved the missing pallet. J.A. xx (ALJ-ABT 21:15-30). Regardless, the theoretical possibility that someone else might have been responsible is insufficient to rebut Shamrock's honest belief, based on the evidence before them at the time, that Meraz committed the error.

3. Alleged Confusion Over The Date That The Lost Pallet Was Received At The Phoenix Warehouse Does Not Establish Pretext

The Board relied heavily on the fact that Ivan Vaivao initially misspoke in testifying that the salad dressing pallet arrived at the warehouse on January 15, the same day that it was lost. J.A. xx (ALJ-ABT 11:5-10). Vaivao later corrected his misstatement on direct examination, and confirmed that the pallet actually arrived on January 13. J.A.

xx (TR2 800:7-801:2). The Board seized upon Vaivao's admitted error in finding that the reasons for Meraz's verbal warning were pretextual.

The pallet's receipt date, however, played no role in the decision to issue Meraz's verbal warning. Rather, the verbal warning was issued because the pallet's LPN history, Meraz's January 13 task history, and the video of the relevant area of the warehouse all confirmed that Meraz was the last associate to touch the pallet before it was lost. Moreover, the reason for Vaivao's error appears in General Counsel's own evidence. In the email from the inventory control clerk submitted as G.C. Ex. 7, the clerk incorrectly stated that the pallet was received on January 15. J.A. xx (TR2 138).

Notably, Meraz testified at one point that the pallet was received four days before it was lost, which was equally incorrect. J.A. xx (TR2 616). Yet, despite the emphasis placed on Vaivao's inadvertent misstatement, the Board ignored Meraz's mistake entirely.

4. The Fact That The Inventory Control Clerk Was Not Disciplined Is Irrelevant

Finally, General Counsel claims that the reason for Meraz's verbal warning was pretextual because the inventory control clerk who was unable to find the pallet that Meraz misplaced was not disciplined. Indeed, finding lost pallets was described as "finding a needle in a haystack" and the General Counsel presented no evidence that not finding a pallet was grounds for discipline under Shamrock's rules or practices. J.A. xx (TR2 373). Meraz testified that the aisle in question contains six levels of racking that

are densely packed with product. J.A. xx (TR2 597). Commensurately, warehouse Manager Ivan Vaivao offered uncontradicted testimony that no inventory control clerk has ever been disciplined for failure to find a pallet that a different associate misplaced. J.A. xx (TR2 803).

* * * *

Setting aside General Counsel's speculation and the morass of theories and speculation, two critical facts are undisputed. Meraz admitted that he may have been responsible for misplacing the special order pallet, and that such a mistake would be a violation of the put-away procedures as stated on his disciplinary form. These facts confirm that his discipline was lawful. The Board's finding of violation is arbitrary and capricious, and should be vacated.

IV. THE BOARD'S ORDER IS INAPPRORIATE

The Board's Order required the notice to be read by or in the presence of its President/CEO and/or its Vice President of Operations is needlessly humiliating, punitive, and contrary to the Act. Section 10(c) of the Act directs the Board, if it concludes that a party before it engaged in an unfair labor practice, to order the offending party "to cease and desist from such unfair labor practice, and to take such affirmative action … as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This authority is remedial. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 187 (1941); *see also Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.").

"The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees." *Teamsters Local 115 v. N.L.R.B. (Haddon House)*, 640 F.2d 392, 399 (D.C. Cir. 1981).

The Board's remedy seeks to inappropriately humiliate high-ranking company officials without any showing that traditional remedies would not effectuate the policies of the Act. There is an element of humiliation in requiring that a company official personally and publically read such notice. *J.P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292, 304 (2nd Cir. 1067). The Fifth Circuit denied such relief as "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *N.L.R.B. v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966). And while the D.C. Circuit has upheld a reading requirement in certain circumstances, *see United Food and Commercial Workers International Union, AFL-CIO v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988), the unfair labor practices at issue in this case are not as personal to the corporate officials or as pervasive as was allowed in that case.

CONCLUSION

For the reasons above, the Court should sustain Shamrock's Petition and vacate the NLRB's Decisions and Orders.

Dated: October 30, 2018

Respectfully submitted,

/s/ Mark W. DeLaquil
MARK W. DELAQUIL
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
Tel: (202) 861-1527
Fax: (202) 861-1783
Email: mdelaquil@bakerlaw.com
Counsel to Shamrock Foods Company

Of Counsel:

TODD A. DAWSON
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, OH 44114-1214

MICHAEL PARENTE
BAKER & HOSTETLER LLP
200 Civic Center Drive
Suite 1200
Columbus, OH 43215-4138

NANCY INESTA
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90025-0509

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(7), I hereby certify that the foregoing Petitioner's Opening Brief contains 17,849 words, as counted by a word processing system that includes headings, footnotes, quotations and citations in the count, and therefore is within the word limit set by the Court. I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Mark W. DeLaquil
Counsel to Shamrock Foods Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Opening Brief and Addendum was filed electronically with the Court by using the CM/ECF system on the 30th day of October 2018. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/ Mark W. DeLaquil
Counsel to Shamrock Foods Company

ADDENDUM

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United States Code Annotated
Title 29. Labor
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29 U.S.C.A. § 151

§ 151. Findings and declaration of policy

Currentness

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

CREDIT(S)

(July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.)

Notes of Decisions (533)

29 U.S.C.A. § 151, 29 USCA § 151
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-253, 115-255 to 115-269. Title 26 current through P.L. 115-270.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Pauma v. National Labor Relations Board, 9th Cir., Apr. 26, 2018

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 152

§ 152. Definitions

Currentness

When used in this subchapter--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any

Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person. [1]

CREDIT(S)

(July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137; Pub.L. 93-360, § 1(a), (b), July 26, 1974, 88 Stat. 395; Pub.L. 95-598, Title III, § 319, Nov. 6, 1978, 92 Stat. 2678.)

Notes of Decisions (1810)

Footnotes

1 So in original. Probably should be "persons".

29 U.S.C.A. § 152, 29 USCA § 152

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-253, 115-255 to 115-269. Title 26 current through P.L. 115-270.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 158

§ 158. Unfair labor practices

Currentness

<Notes of Decisions for 29 USCA § 158 are displayed in two separate documents.>

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with,

a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the

contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization

an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

CREDIT(S)

(July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), Sept. 14, 1959, 73 Stat. 525, 542 to 545; Pub.L. 93-360, § 1(c)-(e), July 26, 1974, 88 Stat. 395, 396.)

Notes of Decisions (5893)

Footnotes

1 So in original. Probably should be “unenforceable”.

29 U.S.C.A. § 158, 29 USCA § 158

Current through P.L. 115-231. Also includes P.L. 115-233 to 115-253, 115-255 to 115-269. Title 26 current through P.L. 115-270.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)

29 U.S.C.A. § 160

§ 160. Prevention of unfair labor practices

Currentness

<Notes of Decisions for 29 USCA § 160 are displayed in two separate documents.>

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional

evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

CREDIT(S)

(July 5, 1935, c. 372, § 10, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Pub.L. 85-791, § 13, Aug. 28, 1958, 72 Stat. 945; Pub.L. 86-257, Title VII, §§ 704(d), 706, Sept. 14, 1959, 73 Stat. 544; Pub.L. 95-251, § 3, Mar. 27, 1978, 92 Stat. 184; Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360.)

Notes of Decisions (5860)

29 U.S.C.A. § 160, 29 USCA § 160
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-253, 115-255 to 115-269. Title 26 current through P.L. 115-270.

End of Document

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter I. National Labor Relations Board
Part 102. Rules and Regulations, Series 8 (Refs & Annos)
Subpart C. Procedure Under Section 10(a) to (i) of the Act for the Prevention of Unfair Labor Practices (Refs & Annos)

29 C.F.R. § 102.31

§ 102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

Effective: March 6, 2017
Currentness

(a) The Board or any Board Member will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control. The Executive Secretary has the authority to sign and issue any such subpoenas on behalf of the Board or any Board Member. Applications for subpoenas, if filed before the hearing opens, must be filed with the Regional Director. Applications for subpoenas filed during the hearing must be filed with the Administrative Law Judge. Either the Regional Director or the Administrative Law Judge, as the case may be, will grant the application on behalf of the Board or any Member. Applications for subpoenas may be made ex parte. The subpoena must show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether ad testificandum or duces tecum, if that person does not intend to comply with the subpoena, must, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received. All petitions to revoke subpoenas must be served on the party at whose request the subpoena was issued. A petition to revoke, if made prior to the hearing, must be filed with the Regional Director and the Regional Director will refer the petition to the Administrative Law Judge or the Board for ruling. Petitions to revoke subpoenas filed during the hearing must be filed with the Administrative Law Judge. Petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Agency's Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which will refer the petition to the Board for ruling. Notice of the filing of petitions to revoke will be promptly given by the Regional Director, the Administrative Law Judge, or the Contempt, Compliance and Special Litigation Branch, as the case may be, to the party at whose request the subpoena was issued. The Administrative Law Judge or the Board, as the case may be, will revoke the subpoena if in their opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke any opposition to the petition, response to the opposition, and ruling on the petition will not become part of the official record except upon the request of the party aggrieved by the ruling, at an appropriate time in a formal proceeding rather than at the investigative stage of the proceeding.

(c) Upon refusal of a witness to testify, the Board may, with the approval of the Attorney General of the United States, issue an order requiring any individual to give testimony or provide other information at any proceeding before the Board if, in the judgment of the Board:

(1) The testimony or other information from such individual may be necessary to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests must be made to the Board in Washington, DC, and the Board will take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the Administrative Law Judge, such requests must be made to the Administrative Law Judge. If the Administrative Law Judge denies the request, the ruling will be subject to appeal to the Board, in Washington, DC, in the manner and to the extent provided in § 102.26 with respect to rulings and orders by an Administrative Law Judge, except that requests for permission to appeal in this instance must be filed within 24 hours of the Administrative Law Judge's ruling. If no appeal is sought within such time, or if the appeal is denied, the ruling of the Administrative Law Judge becomes final and the denial becomes the ruling of the Board. If the Administrative Law Judge deems the request appropriate, the Judge will recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board will take such action on the Administrative Law Judge's recommendation as it deems appropriate. Until the Board has issued the requested order, no individual who claims the privilege against self-incrimination will be required or permitted to testify or to give other information respecting the subject matter of the claim.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will, in the name of the Board but on relation of such private party, institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board will be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

(e) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the Regional Director to inspection of the official transcript of their testimony, but must be entitled to make copies of documentary evidence or exhibits which they have produced.

AUTHORITY: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Current through October 25, 2018; 83 FR 53828.

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